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Seventh report on responsibility of international organizations*

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I. Introduction

1. The present report is intended to provide the basis for the International Law Commission to complete the adoption of its draft articles on responsibility of international organizations at first reading.

2. The International Law Commission so far provisionally adopted 53 draft articles on responsibility of international organizations.[1] Articles 1 to 30 build up Part One, concerning "The internationally wrongful act of an international organization"; articles 31 to 45 cover Part Two, on the "Content of the international responsibility of an international organization", while articles 46 to 53 constitute chapter I ("Invocation of the responsibility of an international organization") of Part Three, relating to "The implementation of the international responsibility of an international organization". At its sixtieth session, the Commission also took note[2] of articles 54 to 60, which had been adopted by the Drafting Committee and are intended to build up chapter II of Part Three, concerning "Countermeasures".

3. With regard to the articles so far adopted there remain certain extant questions, such as the drafting of article 19 ("Countermeasures") in chapter V ("Circumstances precluding wrongfulness") of Part One, and the placement of chapter X ("Responsibility of a State in connection with the act of an international organization"). The present report will address those questions and also propose a few provisions of a general nature to be placed in the Part of the draft articles containing "General provisions".

4. Moreover, as was indicated in earlier reports,[3] it seems advisable for the Commission to review the texts so far adopted before completing the first reading. This would enable the Commission to reconsider some of the draft articles in the light of comments subsequently made by States and international organizations and of later developments that occurred in judicial decisions and in practice. Also the views expressed in legal literature may be taken into account. Thus the present report will include a survey of all the relevant materials and make some proposals for amending the texts that were provisionally adopted or for adding some clarifications in the commentaries.

5. Certain comments were addressed by States and international organizations to the Special Rapporteur's reports and original proposals rather than to the draft articles that had meanwhile been provisionally adopted by the Commission. Comments relating to texts that have been superseded will be considered in the present report only in so far as they may be relevant also for the Commission's draft articles.

6. The present report is divided into sections that correspond to the partitions existing in the texts that were provisionally adopted. Proposals concerning the draft

[1] The text of the draft articles so far provisionally adopted is reproduced in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), chap. VII, sect. C, para. 164.

[2] Ibid., chap. VII, sect. A, para. 134. The text of the draft articles on countermeasures that were adopted by the Drafting Committee (A/CN.4/L.725/Add.1) may be found on the website of the International Law Commission, www.un.org/law/ilc.

[3] In my second report (A/CN.4/541), para. 1; and again in my third (A/CN.4/553), para. 1; fifth (A/CN.4/583), paras. 3-6; and sixth reports (A/CN.4/597), para. 3.

articles to be discussed in the following sections will be made at the end of each section. These proposals include the suggestion of some changes in the order of the existing partitions. In the present report, reference is always made to the current numbering of the draft articles. The numbering will be modified, if required, only at the time of the adoption of the draft articles at first reading.

II. Scope of the articles, use of terms and general principles

7. As stated in article 1, the present draft articles apply to the international responsibility of international organizations (para. 1) and also to "the international responsibility of a State for the internationally wrongful act of an international organization" (para. 2). This article reflects the position taken by the Commission in the articles on the responsibility of States for internationally wrongful acts.[4] This position was expressed in article 57, according to which "[t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".

8. In the current draft articles, while issues concerning attribution of conduct, the breach of an international obligation and circumstances precluding wrongfulness are dealt with in Part One so as to cover all cases in which the international responsibility of an international organization may arise, Part Two only concerns the content of responsibility of an international organization towards another international organization or a State and Part Three the invocation of responsibility of an international organization by another international organization or a State. Endorsing a view that had been expressed within the Commission at its sixtieth session and referred to in the Commission's report,[5] some States suggested that Part Three should include also the invocation by an international organization of the international responsibility of a State.[6] However, this is a matter which lies outside the definition of the scope in article 1. Moreover, if it was felt necessary to specify the rules applying to the invocation of the responsibility of a State by an international organization, the appropriate place would be the articles on State responsibility and not the current draft articles. Various articles of Part Three on State responsibility, such as articles 42, 43, 45 to 50, 52 and 54, could conceivably be extended to cover also the invocation of responsibility by international organizations.

9. The same approach should be taken with regard to various other matters for which the articles on State responsibility only consider inter-State relations, such as

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[4] *Yearbook of the International Law Commission 2001*, vol. II (Part Two), pp. 26-30. The questions left aside by article 57 include that of the responsibility that a State may incur for the conduct of an international organization of which it is not a member. Thus, it is preferable not to follow the suggestion made by Pakistan (A/C.6/58/SR.16, para. 5) and Malaysia (A/C.6/59/SR.23, para. 1) to restrict to "member" States the reference to States in article 1 of the current draft.

[5] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), chap. VII, sect. B, para. 147.

[6] Thus the interventions by Austria (A/C.6/63/SR.18, para. 85), Belarus (A/C.6/63/SR.19, para. 56), the Russian Federation (A/C.6/63/SR.21, para. 42) and Belgium (ibid., para. 47). See also the interventions by Hungary (A/C.6/63/SR.20, para. 29) and Poland (A/C.6/63/SR.21, para. 32).

consent (article 20), necessity (article 25) or the content of international responsibility (Part Two, especially articles 33 and 41). For example, should the same conditions for considering consent a circumstance precluding wrongfulness apply to States and international organizations, article 20 on State responsibility could be amended as follows: "Valid consent by a State *or an international organization* to the commission of a given act by another State precludes the wrongfulness of that State in relation to the former State *or the international organization* to the extent that the act remains within the limits of that consent" (the words in italics have been added).

10. Article 2 defines the term "international organization" for the purposes of the draft articles. It seems clear, and has often been suggested, that also the definition of "rules of the organization" which is currently in article 4, paragraph 4, should be included in article 2 and made more general, so that it would refer to the purposes of all the draft articles and not only, as it presently reads, to those of article 4.

11. The definition of "international organization" in article 2 is more elaborate than the one contained in the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations, which only describes it as "an intergovernmental organization".[7] While not insisting on that definition, some States would have preferred to consider only organizations that have States as their members.[8] The majority of the comments by States were however in favour of referring, as has been done in article 2, also to international organizations which include among their members entities other than States, as reflecting "current reality".[9]

12. In its comments, the United Nations Educational, Scientific and Cultural Organization (UNESCO) noted that the reference in article 2 to the fact that an international organization may be established by "a treaty or other instrument governed by international law" "finds confirmation in the UNESCO practice concerning the creation of intergovernmental organizations through a simplified procedure whereby UNESCO governing bodies (the General Conference and the

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[7] Article 2, para. 1, (i) of the Convention, document A/CONF.129/15. The use of this definition in the current text was advocated by the United Kingdom (A/C.6/58/SR.15, para. 10).

[8] See the interventions by China (A/C.6/58/SR.14, paras. 49 and 51), Israel (A/C.6/58/SR.15, para. 19), Cuba (A/C.6/59/SR.23, para. 24) and Argentina (A/C.6/60/SR.12, para. 79). Some doubts were expressed by the Russian Federation (A/C.6/58/SR.15, para. 29). See also the intervention by El Salvador (A/C.6/60/SR.13, para. 65).

[9] Thus the intervention by Greece (A/C.6/58/SR.15, para. 11). Similar views were expressed by Chile (A/C.6/58/SR.15, para. 17), Pakistan (A/C.6/58/SR.16, para. 6), India (ibid., para. 66), Bulgaria (A/C.6/58/SR.20, para. 62), Hungary (A/C.6/58/SR.21, para. 6), Venezuela (ibid., para. 20), Sierra Leone (ibid., para. 25), Mexico (ibid., para. 47) and Switzerland (A/C.6/60/SR.13, para. 41). While generally approving the definition, France (A/C.6/58/SR.14, para. 55) suggested the following wording: "An international organization is composed of States and may, as the case may be, include among its members entities other than States". Spain (A/C.6/58/SR.15, para. 38) found "merit in the alternative version proposed by France" and proposed the reference to "an international organization established by States and consisting basically of States". These two proposals are in substance very close to the text of article 2; it is not certain that they improve its drafting. The Netherlands (A/C.6/58/SR.14, para. 42), and Portugal (A/C.6/58/SR.15, para. 26) pointed to the possible relevance, for the purposes of international responsibility, of the distinction between full members and associate or affiliate members. This remark does not appear to affect the definition of an international organization, but rather the question of the responsibility of the members of the organization.

Executive Board) adopt their statutes and those Member States interested in their activities may notify the Director-General of their acceptance of the statutes".[10]

13. One State criticized the definition because it does not restrict responsibility of an international organization towards a State to the case in which that State recognizes the legal personality of the organization.[11] The question of whether recognition is a precondition of personality is controversial,[12] but does not need to be settled for the purposes of the current draft. It does not appear necessary to state the conditions for the legal personality of an international organization to arise under international law and to add to the definition in article 2. Clearly, an international organization can be held responsible only if it has legal personality. Should recognition be considered an essential element for the organization's personality to arise, the organization would be responsible only towards those States that had recognized it and the organization's members would acquire responsibility towards the non-recognizing States. The requirement of recognition would not apply when as an objective personality of the international organization can be said to exist.

14. As was noted above (see para. 10), article 2 should include in a second paragraph the definition of "rules of the organization" that is currently contained in article 4, paragraph 4. These rules are defined there as meaning "in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization".

15. The definition above closely resembles the one contained in article 2, paragraph 1, (j) of the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations, which reads as follows: "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".[13] This definition had been considered adequate by several States that had previously expressed their views in the Sixth

[10] See A/CN.4/568/Add.1, sect. II.C. The Netherlands (A/C.6/58/SR.14, para. 40) queried the correctness of the reference, in para. 4 of the commentary to article 2, to resolutions of the General Assembly establishing an international organization. However, there is no need for the relevant resolution to be "binding", as the Netherlands suggested. An example of a resolution by the General Assembly establishing an international organization could be provided by resolution 1995 (XIX) that constituted the United Nations Conference on Trade and Development, although ostensibly as a subsidiary organ.

[11] See the interventions by Austria (A/C.6/61/SR.13, para. 36, and A/C.6/63/SR.18, para. 83). Some weight to recognition was given by China (A/C.6/58/SR.14, para. 50) and the European Commission (see A/CN.4/582, sect. II.J). On the other hand, Ireland (A/C.6/62/SR.18, para. 90) maintained that international responsibility of an international organization does not depend on recognition of its legal personality.

[12] Among the authors that take the position that recognition is essential for legal personality to arise, see M. Mendelson, "The Definition of 'International Organization' in the International Law Commission's Current Project on the Responsibility of International Organizations", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 371; and K. Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), pp. 63-68.

[13] Document A/CONF.129/15.

Committee at the request of the Commission.[14] Apart from some minor stylistic changes, the only amendment was the addition of a reference to "other acts" taken by the organization after the mention of decisions and resolutions.[15] This change allows the wide variety of terminology that is used for describing acts of international organizations to be taken into account.[16]

16. After article 4, paragraph 4, was adopted, some States expressly welcomed the new text.[17] UNESCO approved "the decision to enlarge the definition set forth in the 1986 Vienna Convention [...] to cover, together with 'decisions' and 'resolutions', 'other acts taken by the organization'".[18] A few States expressed doubts about one aspect that was taken over from the Vienna Convention without change: the reference to "established practice".[19] Even if this reference may appear vague, it is hardly dispensable when considering functions and instruments of international organizations.

17. While articles 1 and 2, which respectively concern the scope of the draft articles and the use of terms, relate to the draft articles as a whole, article 3 concerns issues relating to the international responsibility of international organizations and not those relating to the responsibility of a State for the internationally wrongful act of an international organization. It would thus be more logical to include articles 1 and 2 in a short Part One of the draft articles under the heading "Introduction" and start Part Two from article 3, with the title currently given to Part One, "The internationally wrongful act of an international organization".

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[14] See the interventions by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/58/SR.14, para. 25), Austria (ibid., para. 33), Japan (ibid., paras. 36-37), Italy (ibid., para. 45), Canada (A/C.6/58/SR.15, para. 2), Greece (ibid., para. 12), Israel (ibid., para. 20), Portugal (ibid., para. 27) (though advocating "a more exhaustive definition"), the Russian Federation (ibid., para. 30), Spain (ibid., para. 40), Belarus (ibid., para. 42), Egypt (A/C.6/58/SR.16, para. 1), Romania (A/C.6/58/SR.19, para. 53), Venezuela (A/C.6/58/SR.21, para. 21), Sierra Leone (ibid., para. 25) and Mexico (ibid., para. 47). See also the written comments of Mexico (A/CN.4/547, sect. II.F), Poland (ibid.) and the Democratic Republic of the Congo (A/CN.4/556, sect. II.I). The view that the definition in the Convention was "not satisfactory" was voiced by Gabon (A/C.6/58/SR.15, para. 4). France (A/C.6/58/SR.14, para. 58) suggested that one should "consider the clarifications on the subject given by the Institute of International Law in the resolution adopted in Lisbon in 1995" (see *Annuaire de l'Institut de Droit International, Session de Lisbonne*, vol. 66 (Part II), p. 447 (1996)).

[15] According to the Russian Federation, however, the definition in the current draft "had departed from the perfectly satisfactory definition given in article 2 (j)" of the Vienna Convention (A/C.6/59/SR.23, para. 22).

[16] The definition provided by the Institute of International Law (see footnote 14 above) attempted to do this by referring to "constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization". The definition adopted by the Commission is shorter and appears to be more comprehensive.

[17] See especially the interventions by Greece (A/C.6/59/SR.23, para. 38) and Romania (A/C.6/59/SR.25, para. 16).

[18] See A/CN.4/568/Add.1, sect. II.E.

[19] Criticisms on this point were voiced by China (A/C.6/59/SR.21, para. 38) and the Republic of Korea (A/C.6/59/SR.23, paras. 14-15). Portugal (A/C.6/59/SR.22, para. 40) suggested a text that would have deleted any reference to practice. The European Commission (A/C.6/59/SR.21, para. 19) suggested to replace the term "established practice" with "generally accepted practice".

18. Article 3 states the conditions generally applying for the international responsibility of an international organization to arise. Like the parallel provisions in the articles on the responsibility of States for internationally wrongful acts,[20] article 3 is only intended to provide a general description of the preconditions. It is not meant to rule out exceptions and this is made clear in the commentary.[21] In particular, responsibility is not always conditional on the fact that conduct is to be attributed to the international organization. For instance, when an international organization coerces another organization or a State to commit an act that would, but for the coercion, be an internationally wrongful act of the latter organization or of that State, the former organization incurs responsibility even if the conduct is not attributable to it.[22]

19. The view has often been expressed that it should be stated that an international organization should abide by the applicable rules of that organization. While it is to be expected that an international organization does so consistently, the requirement that it should so conduct itself is imposed by the relevant primary rules and is not part of the law of international responsibility.

20. It would be difficult to state, as a general rule, that the breach by an international organization of its relevant rules entails as a consequence an international responsibility. Responsibility would in any case arise only with regard to members of the organization, since the rules of the organization cannot per se be invoked by non-members. Nor could one say, as has been suggested,[23] that an organization is free from international responsibility if it acts in compliance with its constituent instrument.

21. The following proposals are made at the conclusion to section II of the present report:

(a) A new Part One, headed "Introduction", should comprise articles 1 and 2;

(b) Article 4, paragraph 4, should be moved to article 2 as a new paragraph;

(c) The word "article" in that new paragraph should be rendered in the plural;

(d) The present title of Part One should become the title of Part Two and start from article 3;

(e) Article 3 should be placed as the only article in chapter I of Part Two, the title of the chapter being "General principles".

[20] Articles 1 and 2.

[21] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, sect. C, p. 45.

[22] See article 14 of the current draft.

[23] The International Monetary Fund (see A/CN.4/582, sect. II.B) maintained that "the fundamental parameters within which all of an international organization's obligations must be constrained are established in the constituent agreement of the organization, since the outer limits of what the members have agreed to are set out in that charter".

III. Attribution of conduct

22. The general rule on attribution to an international organization, as expressed in article 4, elicited some favourable comments.[24] The fact that the conduct of an organ or agent may be attributed to the relevant international organization only if it is taken "in the performance of functions of that organ or agent" appears to imply that the organ or agent acts in an "official capacity"; it may thus not be necessary to refer to the fact that the person is acting in his or her official capacity, as one State suggested that one should specify.[25] When paragraph 3 states that "rules of the organization shall apply to the determination of the functions of its organs and agents", it does not say that attribution may only be based on the rules of the organization; as was noted by the International Labour Organization, conduct of a person or entity could also be attributed to an international organization on a different, factual basis, when the person or entity is "acting on its instructions, or under its direction or control".[26]

23. The International Labour Organization[27] and UNESCO[28] voiced concerns about the width of the definition of the term "agent" in paragraph 2 of article 4, which covers "officials and other persons or agents through whom the organization acts". As suggested by these international organizations, it would be appropriate to add some qualifications to this definition. In its comments UNESCO considered that attribution should be precluded when the relations between an international organization and a private contractor are governed by a contract that includes a clause purporting to rule out that the contractor "be considered as an agent or member of the staff of UNESCO". However, this type of clause cannot exclude the possibility that, because of factual circumstances, the conduct of the private contractor would nevertheless be attributed to the organization under international law. In order to establish attribution when an international organization acts through a person or entity that is not an organ, according to the International Court of Justice in its advisory opinion on *Reparation for injuries suffered in the service of the*

[24] See the interventions by Germany (A/C.6/59/SR.21, para. 20), France (A/C.6/59/SR.22, para. 7), Belarus (ibid., para. 43), Singapore (ibid., para. 52), Greece (A/C.6/59/SR.23, para. 38) and Romania (A/C.6/59/SR.25, para. 16).

[25] The United Kingdom (A/C.6/59/SR.22, para. 30) would have preferred a reference to the person's "official capacity" rather than to "the performance of the functions". Austria (ibid., para. 18) suggested a reference to both "official capacity" and "functions" and proposed the following text: "An 'agent' or 'organ' of an international organization is a person or entity that has been charged by that organization with carrying out, or helping to carry out, one of its functions, provided the agent or organ is acting in that capacity in the particular instance". Part of this proposal has been adopted in the rewording of article 4, paragraph 2, as suggested in paragraph 23 of the present report.

[26] A/CN.4/568/Add.1, sect. E. Jordan (A/C.6/59/SR.23, para. 32) advocated a "factual test"; Austria (A/C.6/59/SR.22, para. 20) suggested that the case of "a private person acting under the effective control of the organization" should also be considered. As was noted in paragraph 13 of the commentary on article 4, such a person would come within the definition of agent in article 4, paragraph 2. See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. V, sect. C, p. 109. This result would not be changed by the modification of article 4, paragraph 2, as suggested in this section.

[27] See A/CN.4/568/Add.1, sect. E.

[28] Ibid.

United Nations,[29] the decisive factor appears to be whether or not the person or entity has been charged by an organ of the international organization with carrying out, or helping to carry out, one of the functions of that organization. Paragraph 2 could be rephrased as follows:

> "2. For the purposes of paragraph 1, the term 'agent' includes officials and other persons or entities through whom the international organization acts, when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions."

24. In recent years much attention has been devoted to the question whether the conduct of a State organ may be attributed to an international organization when the State organ is put at the organization's disposal. Article 5 considers the case of a State organ retaining its character of State organ, but acting to a certain extent under the control of an international organization, at the disposal of which it has been placed. The criterion for attribution set out in article 5 is that of the "effective control" over the conduct in question.

25. Several States indicated their approval of the criterion of "effective or factual control" as adopted in article 5.[30] It was noted in one comment that this criterion was tailored for "military operations" and was "less adequate for deciding attribution in the case of other types of cooperation between international organizations and States or other international organizations".[31] It may well be that outside military operations it may be more difficult to establish which entity has an effective control.[32] However, this does not imply that the criterion set out in article 5 is inadequate, but that in many cases its application will lead to the conclusion that conduct has to be attributed both to the lending State and to the receiving international organization.

26. After article 5 was adopted, the European Court of Human Rights considered, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the issue of attribution of conduct in the case of forces placed in Kosovo at the disposal of the United Nations (United Nations Interim Administration Mission

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[29] *I.C.J. Reports*, 1949, p. 174 at p. 177. According to the International Monetary Fund (A/CN.4/556, sect. II.F), this dictum is not applicable to IMF, to which "only acts of officials performed in their official capacity would be attributable".

[30] Germany (A/C.6/59/SR.21, para. 21), Italy (ibid., para. 32), China (ibid., para. 39), the Islamic Republic of Iran (A/C.6/59/SR.22, para. 6), France (ibid., para. 8), New Zealand (A/C.6/59/SR.23, para. 8), the Russian Federation (ibid., para. 22), Mexico (ibid., para. 26), Greece (ibid., para. 39) and Romania (A/C.6/59/SR.25, para. 16). Also the International Monetary Fund endorsed article 5 (A/CN.4/556, sect. II.F). Japan (A/C.6/59/SR.21, para. 55) required "clarification" of the standard and Belarus (A/C.6/59/SR.22, para. 44) a "clear definition of the term 'effective control'". Austria (ibid., para. 19) suggested a reference to the fact that the State organ was exercising one of the functions of the organization; this could be taken as implied, but may be specified in the commentary. The Republic of Korea (A/C.6/59/SR.23, paras. 16-17) proposed to take into consideration the criterion of overall control, that has been generally applied to the different issue of the attribution to a State of conduct by private persons.

[31] Thus Denmark, on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/59/SR.22, para. 62).

[32] The International Labour Organization (see A/CN.4/568/Add.1, sect. F) noted that, when an official is seconded but is "kept under employment contract with the releasing State or international organization", the "issue of effective control over the official's conduct is not so obvious".

in Kosovo (UNMIK)) or authorized by the United Nations (Kosovo Force (KFOR)). These cases raised the question of the Court's jurisdiction *ratione personae* with regard to applications that challenged the lawfulness of conduct taken by national contingents. The Court quoted *in extenso* article 5 of the Commission's draft and summarized various paragraphs of the related commentary.[33] The Court's decision did not contain any criticism of the criterion that was stated by the Commission; however, the Court made use of a different notion of control for reaching its decision. It considered that the decisive point was whether "the United Nations Security Council retained ultimate authority and control so that operational command only was delegated".[34] While acknowledging "the effectiveness or unity of NATO command in *operational* matters",[35] the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN within the meaning of the word outlined [in article 3 of the ILC draft]".[36] With regard to UNMIK, the Court stated that it was "a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, 'attributable' to the UN in the same sense".[37] Several commentators rightly observed that, had the Court applied the criterion of effective control set out by the Commission, it would have reached the different conclusion that the conduct of national contingents allocated to KFOR had to be attributed either to the sending State or to NATO.[38]

27. In *Kasumaj v. Greece*[39] and *Gajić v. Germany*[40] the European Court of Human Rights reiterated its views concerning the attribution to the United Nations of conduct taken by national contingents allocated to KFOR. Likewise in *Berić and*

[33] Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, paras. 29-33.

[34] Para. 133.

[35] Para. 139.

[36] Para. 141.

[37] Para. 143.

[38] See P. Bodeau-Livinec, G. P. Buzzini and S. Villalpando, note, *American Journal of International Law*, vol. 102 (2008), p. 323, at pp. 328-329; P. Klein, "Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami et Saramati*", *Annuaire français de droit international*, vol. 53 (2007), p. 43, at p. 55; Ph. Lagrange, "Responsabilité des Etats pour actes accomplis en application du chapitre VII de la Charte des Nations Unies", *Revue Générale de Droit International Public*, vol. 112 (2008), p. 85, at pp. 94-95; K. M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *European Journal of International Law*, vol. 19 (2008), p. 509, at pp. 521-522; M. Milanović and T. Papić, "As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law", *International and Comparative Law Quarterly*, vol. 58 (2009) (forthcoming); A. Orakhelashvili, note, *American Journal of International Law*, vol. 102 (2008), p. 337, at p. 341; P. Palchetti, "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami* e *Saramati*", *Rivista di Diritto Internazionale*, vol. 90 (2007), p. 681, at pp. 689-690; A. Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases", *Human Rights Law Review*, vol. 8 (2008), p. 151, at p. 164.

[39] Decision of 5 July 2007 on the admissibility of application no. 6974/05.

[40] Decision of 28 August 2007 on the admissibility of application no. 31446/02.

others v. Bosnia and Herzegovina[41] the same Court quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that also the conduct of the High Representative in Bosnia and Herzegovina had to be attributed to the United Nations.

28. The judgment given by the House of Lords in *Al-Jedda* also contains ample references to article 5 of the Commission's draft and the related commentary.[42] One of the majority opinions stated that "[i]t was common ground between the parties that the governing principle [was] that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organizations".[43] The House of Lords was confronted with a claim arising from the detention of a person by British troops in Iraq. In its resolution 1546 (2004) the Security Council had previously authorized the presence of the multinational force in that country. The majority of opinions appeared to endorse the views expressed by the European Court of Human Rights in *Behrami and Saramati*, but distinguished the facts of the case and concluded that "[i]t cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant".[44]

29. More recently, a judgment by the District Court of The Hague concerned the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica. This judgment contained only a general reference to the Commission's draft.[45] The Court found that "the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent" and that "these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations".[46] The Court then considered that if "Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests".[47] The Court did not find that there was sufficient evidence for reaching such a conclusion.

30. The positive reaction generally adopted by States with regard to the criterion set out in article 5 and the absence of any criticism of that criterion in any of the judicial decisions referred to above give an indication that no change should be suggested to article 5. It is true that the European Court of Human Rights applied a different criterion for attribution and reached, with regard to attribution of conduct of national contingents allocated to a force authorized by the United Nations, a

[41] Decision of 16 October 2007 on the admissibility of applications nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

[42] Judgment of 12 December 2007, R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence.

[43] Ibid., para. 5 of the opinion of Lord Bingham of Cornhill.

[44] Thus the opinion of Lord Bingham of Cornhill, paras. 22-24 (the quotation is taken from para. 23). Baroness Hale of Richmond (para. 124), Lord Carswell (para. 131) and Lord Brown of Eaton-under-Heywood (paras. 141-149, with his own reasons) concurred on this conclusion, while Lord Rodger of Earlsferry dissented.

[45] Judgment of 10 September 2008, case no. 265615/HA ZA 06-1671, para. 4.8. English translation at http://zoeken.rechtspraak.nl.

[46] Ibid., para. 4.11.

[47] Ibid., para. 4.14.1.

conclusion that differed from the one that would have been reached on the basis of article 5, as was specified in the commentary.[48] Without denying the importance of this jurisprudence, it would be difficult to accept, simply on the strength of the judgment in *Behrami and Saramati*, the criterion there applied as a potentially universal rule. Also as a matter of policy, the approach taken by the European Court of Human Rights is unconvincing. It would lead to attributing to the United Nations conduct which the organization has not specifically authorized and of which it may have little knowledge or no knowledge at all. It is therefore not surprising that in his report of June 2008 on the United Nations Interim Administration Mission in Kosovo, the United Nations Secretary-General distanced himself from that criterion and stated: "It is understood that the international responsibility of the United Nations will be limited to the extent of its effective operational control".[49]

31. Also with regard to the relations between an international organization and State organs that act for the organization, the European Commission suggested adding a rule on attribution so that, when implementing a binding act of the European Community or "other potentially similar organizations", the conduct of the organ of a member State would be attributed to that international organization.[50] The State organ would then act quasi as an organ of the international organization. One could envisage a more general rule based on the same rationale, to the effect that conduct taken for the implementation of a binding act of an international organization would be attributed to that organization.

32. A World Trade Organization panel seemed receptive to this approach. In *European Communities — Protection of Trademarks and Geographical Indication for Agricultural Products and Foodstuffs* the panel "accepted the European Communities' explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general'".[51]

33. With regard to the implementation of a regulation of the European Community by one of its member States, the European Court of Human Rights took a different view in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*. The Court found that "a Contracting Party is responsible under article 1 of the [European Convention on Human Rights] for all acts and omissions of its organs regardless of

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[48] *General Assembly, Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. V, sect. C, p. 102.

[49] S/2008/354, para. 16.

[50] A/C.56/59/SR.21, para. 18. This view was developed by P. J. Kuijper and E. Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review*, vol. 1 (2004), p. 111, at p. 127, and by S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment?", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), p. 405, at pp. 412-414.

[51] Report of 15 March 2005 (WT/DS174/R), para. 7.725. Again with regard to a claim brought against the European Communities, the panel report of 29 September 2006 on *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R, WT/DS292/R and WT/DS293/R), para. 7.101, reiterated the same view.

whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations".[52] The same line was taken by the European Court of Justice in *Kadi, Al Barakaat International Foundation v. Council and Commission* when it considered the attribution of a regulation adopted by the European Community for complying with a binding resolution of the United Nations Security Council. According to this Court, "the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that Chapter".[53] These judicial decisions, both of which examined the implementation of a binding act that left no discretion, clearly do not lend support to the proposal of considering that conduct implementing an act of an international organization should be attributed to that organization. This proposal would moreover conflict with the rule that conduct taken by any one of State organs is attributed to the State, as set out in article 4 of the articles on the international responsibility of States for internationally wrongful acts.

34. Article 6 of the current draft considers that the conduct of one of the organs or agents of an international organization is attributed to that organization even when the organ or agent acts in "excess of authority or contravention of instructions". Attribution is considered to be conditional on the organ or agent acting "in that capacity", that is in connection with his or her functions. It is thus to be assumed that attribution does not occur "when the conduct [...] clearly exceed[s] the authority of the organs or agents, or when it obviously contravene[s] the instructions of the organization".[54]

35. Various States approved the criterion set out in this article.[55] Some States suggested that a specific reference be added to the case of an organ or agent exceeding the competence of the organization.[56] As was indicated in the commentary on article 6, this conclusion is implied, "because an act exceeding the competence of the organization necessarily exceeds the organ's or agent's authority".[57]

36. The International Criminal Police Organization (ICPO)-INTERPOL observed that, for the purposes of attribution, "when the ultra vires act exceeds the competence of the organization, the proposed rule becomes less persuasive".[58] A similar remark was made by the International Labour Organization.[59] ICPO-INTERPOL would have liked the text to specify that attribution be excluded when

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[52] Judgment (Grand Chamber) of 30 June 2005, application no. 45036/98, para. 153.

[53] Judgment (Grand Chamber) of 3 September 2008, joined cases C-402/05 P and C-415/05 P, para. 314.

[54] This solution, that was advocated by Malaysia (A/C.6/59/SR.23, para. 1), is arguably implied in article 6.

[55] See the interventions by Germany (A/C.6/59/SR.21, para. 21), Singapore (A/C.6/59/SR.22, para. 52), Jordan (A/C.6/59/SR.23, para. 32) and Romania (A/C.6/59/SR.25, para. 16). On the contrary, the Russian Federation (A/C.6/59/SR.23, para. 22) would have preferred the application of the criterion set out in article 4, paragraph 1.

[56] France (A/C.6/59/SR.22, para. 9) and Greece (A/C.6/59/SR.23, para. 40).

[57] *General Assembly, Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. V, sect. C, p. 116.

[58] See A/CN.4/556, sect. G.

[59] See A/CN.4/568/Add.1, sect. G.

the violation of the rules on competence of the organization is "manifest".[60] However, the consideration that attribution is excluded when there is a manifest excess of authority applies more generally. In the presence of a manifest excess of authority, whether or not it affects the competence of the international organization, one cannot say that the organ or agent acted "in that capacity". This may not seem obvious from a reading of the text. While an attempt could be made to make the meaning of the text more transparent, on balance it seems preferable to keep the same wording that was used in article 7 of the articles on the responsibility of States for internationally wrongful acts.

37. Article 7 considers the case of an international organization acknowledging that a certain conduct should be attributed to it.[61] A few States expressed specific support for this article,[62] while one State found that the provision was "inconceivable in the context of international organizations"[63] and another that there was no "jurisprudence or practice to support that approach".[64] Acknowledgement of attribution is certainly not a frequent event, either by a State or by an international organization. Yet the commentary on article 7 gave some examples of practice relating to international organizations.[65] Article 7 could have been omitted, and so, arguably, could have been the corresponding provision in the articles on the responsibility of States for internationally wrongful acts. Once a provision on acknowledgement of attribution was included in the latter articles, it seems reasonable to adopt the same solution with regard to international organizations.

38. In conclusion to the present section (which comprises articles 4 to 7), the only suggested change concerns a new wording of paragraph 2 of article 4, as proposed above, paragraph 23. It may be useful to recall that a proposal concerning article 4, paragraph 4, has been made in the previous section (paras. 10 and 21).

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[60] See A/CN.4/556, sect. G.

[61] This rule is not intended to imply "a transfer of responsibility" which could "adversely affect the position of the injured State", contrary to what was suggested by C. Yamada, "Revisiting the International Law Commission's Draft Articles on State Responsibility", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), p. 117, at p. 122.

[62] France (A/C.6/59/SR.22, para. 10), the Russian Federation (A/C.6/59/SR.23, para. 22) and Romania (A/C.6/59/SR.25, para. 16).

[63] Thus Portugal (A/C.6/59/SR.22, para. 42).

[64] Jordan (A/C.6/59/SR.23, para. 32).

[65] *General Assembly, Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. V, sect. C, pp. 121-122.

IV. Breach of an international obligation

39. The chapter on the breach of an international obligation in the current draft (articles 8 to 11) has been basically modelled on the corresponding articles on the responsibility of States for internationally wrongful acts. Various States approved the approach taken on this matter by the Commission.[66] Moreover, no criticism was expressed in this regard.

40. The main question raised by the present chapter concerns the definition of obligations under international law as applied to an international organization. These include obligations that are imposed by rules of general international law and by treaties concluded by the organization concerned.[67] They also comprise obligations under the rules of the organization; however, it is debatable to what extent these rules are part of international law. Article 8, paragraph 2, does not attempt to provide a clear-cut solution. As was approvingly noted by some States during the debates in the General Assembly, "[a]lthough article 8, paragraph 2, did not really clarify which rules [give rise to international responsibility], it provide[s] for a case-by-case determination of the international legal character of the various types of rules of international organizations".[68] Some other States endorsed article 8, paragraph 2.[69] Further States maintained that all the rules of the organization imposed obligations under international law and that article 8, paragraph 2, should be deleted.[70] Yet other States requested "more guidance" on what obligations under the rules of the organization actually constituted obligations under international law.[71]

41. The fact that a rule of the organization "bound, or granted rights to, persons or entities that were subjects of international law"[72] cannot be a decisive criterion for

[66] France (A/C.6/60/SR.11, para. 76), Romania (A/C.6/60/SR.12, para. 75), Argentina (ibid., para. 81), Denmark, on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/60/SR.13, para. 18), Greece (ibid., para. 25, with regard to article 8, paragraph 1), Poland (ibid., paras. 58-59) and Nigeria (A/C.6/60/SR.20, para. 48, with reference to article 8). Guatemala (A/C.6/60/SR.12, para. 101) suggested specifying in article 8, paragraph 1, that the international obligation in question was "binding on the international organization". This seems implied by the fact that, according to article 8, paragraph 1, the act of the international organization has to be "not in conformity with what is required of it by the obligation". Although it has a different object, article 9 confirms that the organization is "bound by the obligation".

[67] This is not the opinion of the International Monetary Fund, according to whom "the issue of whether there is a breach of an international obligation by an international organization can only be determined by reference to the rules of the organization (save in exceptional cases involving peremptory norms of general international law)" (see A/CN.4/582, sect. II.C).

[68] Thus Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/60/SR.13, para. 18).

[69] Ireland (A/C.6/60/SR.11, para. 38), France (ibid., para. 76) and the Russian Federation (A/C.6/60/SR.12, para. 66). The latter State found that the solution provided by article 8, paragraph 2, was "elegant" and that "[t]he precise circumstances in which a breach of the rules gave rise to such responsibility obviously had to be decided in each specific case in the light of the type of rule in question".

[70] Austria (A/C.6/60/SR.11, para. 60), Portugal (A/C.6/60/SR.12, para. 34), Hungary (A/C.6/60/SR.13, para. 6) and Bulgaria (A/C.6/62/SR.18, para. 82).

[71] Thus Greece (A/C.6/60/SR.13, para. 25). Similar remarks were made by Canada (A/C.6/60/SR.11, para. 69), Argentina (A/C.6/60/SR.12, para. 83), Jordan (A/C.6/60/SR.13, para. 13), Germany (ibid., para. 33) and Spain (ibid., para. 51).

[72] Thus Guatemala (A/C.6/60/SR.12, para. 99).

identifying which rules of the organization pertain to international law, because certain relations between subjects of international law could well be regulated by private law. Some States maintained that "rules which were merely procedural or administrative in nature" did not give rise to an international obligation.[73] The World Health Organization stated that it could not "share the view that the rules governing employment of the officials of an organization are rules of international law".[74] The difficulty with providing a general criterion is that the extent to which the breach of an obligation under the rules of the organization constitutes the breach of an obligation under international law is likely to vary according to the organization concerned.[75] Thus, although the subject-matter may give some indication on the legal nature of the rules of the organization, it cannot be taken as decisive.

42. One State noted that the wording of paragraph 2 seemed to imply that "without paragraph 2, international obligations created by the rules of the organization would not be covered by the draft articles".[76] It would be useful to avoid any misunderstanding on this point. Moreover, paragraph 2 could be rephrased in order to state more clearly that the rules of the organization are in principle part of international law, thus conveying that there are certain exceptions. The paragraph could read as follows:

> "The breach of an international obligation by an international organization includes in principle the breach of an obligation under the rules of that organization."

43. The International Monetary Fund[77] and UNESCO[78] expressed doubts about whether an international organization could be required to take positive action: this in particular in view of the difficulty for the organization in complying with this type of obligation, since its decision-making process may not allow the organization to adopt the necessary action.[79] However, this difficulty cannot be a reason for generally excluding the possibility that international organizations may be the legal addressees of an international obligation to take positive action.

44. In conclusion to the present section, it is suggested that paragraph 2 of article 8 should be modified as indicated above, paragraph 42.

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[73] Thus India (A/C.6/60/SR.18, para. 59). Similar proposals were made by Switzerland (A/C.6/60/SR.13, para. 43) and Indonesia (A/C.6/60/SR.20, para. 5).

[74] See A/CN.4/593, sect. II.B; the same point had been made in an earlier comment, see A/CN.4/568, sect. II.C.

[75] A remark to this effect was made by Singapore (A/C.6/59/SR.22, para. 56).The European Commission (A/C.6/60/SR.12, paras. 11-12) and Romania (ibid., para. 76) stressed the particular situation of the European Community.

[76] Canada (A/C.6/60/SR.11, para. 68).

[77] See A/CN.4/545, sect. II.D.

[78] See A/CN.4/568/Add.1, sect. II.D.

[79] See also the intervention of Bulgaria (A/C.6/62/SR.18, para. 81).

V. Responsibility of an international organization in connection with the act of a State or another international organization

45. The first three articles of the chapter on "Responsibility of an international organization in connection with the act of a State or another international organization" (articles 12 to 14) are parallel to articles 16 to 18 on the responsibility of States for internationally wrongful acts. They concern the cases of an international organization aiding or assisting, or directing or controlling, or coercing a State or another international organization in the commission of an internationally wrongful act. Although these cases may rarely occur, several States accepted the idea that, if one of them takes place, an international organization should be responsible under the same conditions as a State aiding or assisting, or directing and controlling, or coercing another State.[80] This implies in particular that, for responsibility to arise, the act would have to be internationally wrongful if it had been committed by the international organization that, for instance, assists a State in the commission of the wrongful act.[81]

46. Certain States expressed concern about the possible overlap between articles 12 to 14 and article 15, which considers the responsibility of an international organization that circumvents an international obligation by binding its members to take a certain act, or by authorizing or recommending that conduct.[82] A partial overlap may not be excluded. However, an overlap would not lead to a conflict, because all the provisions concerned may lead, under different conditions, to establishing the responsibility of the same international organization.

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[80] France (A/C.6/60/SR.11, para. 78, with reference to articles 13 and 14), Romania (A/C.6/60/SR.12, para. 75), New Zealand (ibid., para. 110), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/60/SR.13, para. 18), Germany (ibid., para. 33), Poland (ibid., para. 59, with regard to article 13, though requesting "further clarification") and Nigeria (A/C.6/62/SR.24, para. 4).

[81] The United States (A/C.6/60/SR.12, para. 24) raised the question whether an international organization assisting a State in the commission of a wrongful act would incur responsibility even if the obligation binding the organization was not the same as the one binding the assisted State. Article 12, as the corresponding article on the responsibility of States for internationally wrongful acts, appears to assume that the assisting and assisted entities are under the same obligation. See paragraph 6 of the commentary on article 16 on State responsibility, *Yearbook ... 2001*, vol. II (Part Two), p. 66. The Russian Federation (A/C.6/60/SR.12, para. 67) criticized the requirement in articles 12 and 13 of the current draft that the act be wrongful if committed by the international organization, for the reason that "some actions could be taken only by States and not by international organizations". This would not necessarily make the act lawful if performed by the international organization. Guatemala (A/C.6/60/SR.12, paras. 102-103) and Israel (A/C.6/60/SR.16, para. 55) made a more general criticism of the same requirement, involving also the articles on State responsibility.

[82] See the interventions by the Russian Federation (A/C.6/60/SR.12, para. 68), Jordan (A/C.6/60/SR.13, para. 11) and Germany (ibid., paras. 33-34). France (A/C.6/60/SR.11, para. 78) insisted on avoiding "any needless confusion over the differences between the necessary respect for binding decisions of an international organization and the idea of coercion". According to Portugal (A/C.6/60/SR.12, para. 33) there was "no situation that might be subject to the provisions of draft articles 12, 13 and 14 that was not also covered by draft article 15". This would be hard to prove, if only because the latter provision exclusively concerns the relations between an international organization and its members.

47. Article 15 is designed to prevent an international organization from successfully circumventing one of its international obligations by availing itself of the separate legal personality of its members, whether States or other international organizations. The provision considers international responsibility only to the extent that the former international organization may incur it. Article 16 makes it clear that the draft does not address the question of the responsibility that members may incur in such circumstances, supposing that by their conduct they breach one of their obligations.

48. The idea that "an international organization should not be allowed to escape responsibility by 'outsourcing' its actors"[83] was welcomed by certain States,[84] when it was first mooted in a request for comments made by the Commission.[85] After article 15 was adopted, several States expressed their approval, albeit sometimes with comments.[86] Moreover, a few States and the European Commission made certain proposals that would imply an extension of the responsibility of an international organization as envisaged in article 15.[87]

49. On the other hand, a few States and the International Labour Organization considered that the requirement that "the unlawful act in question should actually be committed" should apply not only, as paragraph 2 provides, in the case of recommendations or authorizations, but also in the case, considered in paragraph 1, that the international organization binds its members with a decision.[88]

50. With regard to circumvention through a non-binding act, some States and the International Monetary Fund argued that, since members are free not to act upon an authorization or recommendation, the international organization should not incur responsibility if they take the authorized or recommended action.[89] One State noted that it "might be necessary to introduce some new element in [article 15] that would make it possible to take into consideration the variety of legal regimes that existed

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[83] Thus Austria (A/C.6/59/SR.22, para. 24).

[84] New Zealand (A/C.6/59/SR.23, para. 11), the Russian Federation (ibid., para. 23) and Cuba (ibid., para. 25).

[85] *General Assembly, Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), chap. III, sect. C, para. 25.

[86] China (A/C.6/60/SR.11, para. 51), Italy (A/C.6/60/SR.12, para. 3), the Netherlands (ibid., paras. 16-17, considering, however, that "the meaning and scope of the criterion [of circumvention] were not clear"), Belarus (ibid., para. 48), New Zealand (ibid., para. 110), Hungary (A/C.6/60/SR.13, para. 7, with the request that the meaning of the word "circumvention" should be "further clarified"), Greece (ibid., para. 26), Germany (ibid., para. 34, with reference to paragraph 1) and India (A/C.6/60/SR.18, para. 60). See also the intervention by the European Commission (A/C.6/60/SR.12, para. 13).

[87] Guatemala (A/C.6/60/SR.12, para. 105) suggested the deletion in paragraphs 1 and 2 of the words "and would circumvent an international obligation of the former organization". The European Commission (A/C.6/60/SR.12, para. 14; see also A/CN.4/568/Add.1, sect. II.I) wondered whether "the notion of circumvention was superfluous". A similar view was expressed by Greece (A/C.6/60/SR.13, para. 28). With reference to paragraph 2, the Russian Federation (A/C.6/60/SR.12, para. 69) considered that "the organization must incur responsibility, even when its members did not use its recommendation or authorization".

[88] France (A/C.6/60/SR.11, para. 79), Jordan (A/C.6/60/SR.13, para.14, from which the quotation is taken) and the International Labour Organization (see A/CN.4/568/Add.1, sect. II.I).

[89] United States (A/C.6/60/SR.12, para. 27), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/60/SR.13, para. 19), Germany (ibid., para. 34), Switzerland (ibid., para. 45), the Islamic Republic of Iran (A/C.6/62/SR.25, para. 50 and A/C.6/63/SR.24, para. 35) and the International Monetary Fund (see A/CN.4/582, sect. II.I).

among international organizations".[90] Another State stressed the need for a "very close connection between the authorization or recommendation and the relevant act of the member State".[91]

51. In view of these suggestions, an attempt should be made to restrict responsibility in paragraph 2 by using a slightly different wording, that would emphasize the role played by the authorization or the recommendation in determining the member to act consistently with the act of the international organization. A possible improvement in this direction could be to rephrase paragraph 2 (b) of article 15 as follows:

> "(b) That State or international organization commits the act in question as the result of that authorization or recommendation".

52. Although the title refers to the responsibility of an international organization "in connection with the act of a State or another international organization", the chapter now under examination does not contain any provision relating to the possibility that an international organization incurs responsibility as a member of another international organization. The question of the responsibility of members is considered elsewhere in the draft with reference to the responsibility of member States (articles 28 and 29). Since international organizations are not frequently members of other international organizations, it is understandable that the discussion on the responsibility of members has been centred on the responsibility of member States. However, as was noted by one State, "the responsibility of members could also be incurred by international organizations which were members of other international organizations".[92]

53. It would be difficult to assume that an international organization that is a member of another international organization would incur responsibility on conditions that are different from those applying to a member State. This could be reflected in a provision to be placed in the present chapter as draft article 15bis, with the title "Responsibility of an international organization for the act of another international organization of which it is a member". The provision could simply contain a reference to the conditions set out in articles 28 and 29. The following text is suggested:

> "Responsibility of an international organization that is a member of another international organization may arise in relation to an act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization."

54. In conclusion to the present section, the following proposals are made:

(a) Article 15, paragraph 2 (b), is reworded as suggested above, paragraph 51;

(b) A new article 15bis, as drafted in paragraph 53, is added.

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[90] Thus Spain (A/C.6/60/SR.13, para. 52).

[91] Austria (A/C.6/60/SR.11, paras. 61-62). The suggested rewording (to use the term "in compliance with" or "in conformity with" instead of "in reliance") does not seem to attain the intended result.

[92] Thus the Netherlands (A/C.6/61/SR.14, para. 20).

VI. Circumstances precluding wrongfulness

55. Several States expressed their general agreement with the draft articles included in chapter V of Part One ("Circumstances precluding wrongfulness"), albeit sometimes with specific comments concerning certain provisions.[93]

56. Only a few remarks regarded article 17, relating to consent.[94] One State noted that an *ultra vires* act by an international organization would not be sufficient to determine consent.[95] Another State suggested that the Commission should define "what constituted valid consent, the limits of consent, and how those limits were determined".[96] However, as was noted in paragraph 4 of the commentary,[97] an elaboration of the questions raised by the use of the term "valid" as referring to consent would lead to a discussion on matters outside the framework of international responsibility. It would thus be preferable to refrain from further elaborating this question. The same approach had been taken by the Commission with regard to consent as a circumstance precluding wrongfulness in the articles on the responsibility of States for internationally wrongful acts.[98]

57. The International Monetary Fund stressed the importance of "consent that occurs upon a State's accession to an international organization's charter".[99] Consent given by a State when acceding to the constituent instrument of an international organization is no doubt relevant in order to exclude the responsibility of that organization with regard to an act of the organization that has been agreed to. However, the act of the organization would then be lawful on the basis of the applicable rules of international law and would not need to be justified by a circumstance precluding wrongfulness.

58. Article 18 on self-defence raised various critical comments. It was noted that "the concept of self-defence as applied to international organizations differed considerably from the concept of self-defence as applied to States".[100] It was also observed that "Article 51 of the Charter of the United Nations did not directly apply to the self-defence of international organizations".[101] Some States argued that

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[93] See the interventions by Finland, on behalf of the European Union (A/C.6/61/SR.13, para. 27), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., para. 30), Ireland (ibid., para. 42), Argentina (ibid., para. 48), Spain (A/C.6/61/SR.14, para. 48, with the exception of articles 18 and 22) and France (ibid., para. 59). See also the interventions by Belarus (ibid., para. 98) and Poland (ibid., para. 103).

[94] The "vital importance" of consent to the European Union was stressed by Finland, on behalf of the European Union (A/C.6/61/SR.13, para. 25), and the European Commission in its written comments (see A/CN.4/582, sect. II.K).

[95] Thus Poland (A/C.6/61/SR.14, para. 103).

[96] This view was expressed by Ethiopia (A/C.6/61/SR.14, para. 93). Comments on the validity and limits of consent were made by the Islamic Republic of Iran (A/C.6/61/SR.15, para. 51) and Jordan (A/C.6/61/SR.16, para. 2).

[97] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, p. 265.

[98] *Yearbook ... 2001*, Vol. II (Part Two), p. 73.

[99] See A/CN.4/582, sect. II.K.

[100] This is how this frequent remark was voiced by Spain (A/C.6/61/SR.14, para. 48).

[101] Thus Japan (A/C.6/61/SR.14, para. 57). Similar observations were made by Austria (A/C.6/61/SR.13, para. 38), Portugal (A/C.6/61/SR.14, para. 74), the United States (ibid., para. 82), the United Kingdom (A/C.6/61/SR.15, para. 26) and the Islamic Republic of Iran (ibid., para. 52).

"self-defence, by its nature, was applicable only to the actions of a State".[102] Also according to the World Health Organization, "a circumstance such as self-defence is by its very nature only applicable to the actions of a State".[103]

59. The instances in which self-defence could be relevant for an international organization as a circumstance precluding wrongfulness are limited and sometimes unclear, even if one may not agree with the remark that, when an international organization is administering a territory or deploying an armed force, "the State whose forces were in the territory or the individual members of those armed forces were the entities exercising self-defence".[104] Should no reference be made to self-defence in the current draft, an international organization would not necessarily be precluded from invoking self-defence as a circumstance precluding wrongfulness. This will be on the basis of a general provision (see below, draft article 62), that leaves unprejudiced questions of responsibility not regulated by the present draft. Thus, in view of the many critical comments expressed by States and international organizations, it would seem preferable for the Commission to delete article 18 and leave the matter of invocability of self-defence unprejudiced.

60. When the Commission discussed circumstances precluding wrongfulness at its fifty-eighth session, the question of whether to include in the pertinent chapter a provision on countermeasures was left open, pending the examination of countermeasures in the context of the invocation of responsibility of international organizations.[105] Chapter II of the current Part Three, which has not yet been provisionally adopted by the Commission, has been drafted by the Drafting Committee on the basis of the premise that international organizations, like States, may take countermeasures against a responsible international organization. When discussing circumstances precluding wrongfulness one should therefore start from the same premise.

61. With regard to countermeasures that an international organization may take against another international organization, it would be coherent to consider that a circumstance precluding wrongfulness justifies an otherwise wrongful act subject to the conditions set out in chapter II of Part Three, which covers countermeasures taken both by international organizations and by States against an international organization.

62. However, countermeasures are more likely to be taken by an international organization against a responsible State. Practice shows a number of examples, particularly relating to the case of an international organization that, while not

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[102] The quotation is from the intervention by India (A/C.6/61/SR.16, para. 8). Similar views were expressed by Jordan (ibid., para. 2) and Bulgaria (A/C.6/62/SR.18, para. 83). Doubts about the applicability of self-defence to international organizations were voiced also by Cuba (A/C.6/61/SR.16, para. 12) and Romania (A/C.6/61/SR.19, para. 60).

[103] See A/CN.4/568, sect. II.F.

[104] Thus Portugal (A/C.6/61/SR.14, para. 74). The contrary view that self-defence may be invoked by the United Nations when they administer a territory was expressed by C. Dominicé, "La responsabilité internationale des Nations Unies", in: J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies, Commentaire article par article* (3rd ed., Paris: Economica, 2005), p. 141, at p. 157.

[105] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, p. 268.

"injured" within the meaning of article 46, invokes responsibility according to article 52.[106]

63. The International Monetary Fund gave as an example of countermeasures the action that the Fund may take under article V, section 5, of the Articles of Agreement, "whenever IMF is of the opinion that a member is using the Fund's general resources in a manner contrary to the organization's purposes".[107] However, this pertains to the sanctions that an international organization may take against a member under the rules of the organization. In the relations between an international organization and one of its members, these sanctions are per se lawful and cannot be considered as countermeasures.

64. Since practice appears to point to the conclusion that international organizations are placed in substantially the same position as States when they take countermeasures against a State,[108] article 19 could contain a reference to the conditions that States need to comply with for their countermeasures to be considered lawful. However, such a reference could be made only in general terms, given the still undefined status of the articles on the responsibility of States for internationally wrongful acts. It would thus be preferable to allude to the conditions for the lawfulness of countermeasures by simply requiring their "lawful" character. This same term would also apply to the conditions under which an international organization may take countermeasures against another international organization.

65. The principle of cooperation that restricts recourse to countermeasures in the relations between an international organization and its members appears to be relevant not only when a State or an international organization takes countermeasures against another international organization of which it is a member,[109] but also when an international organization takes countermeasures against one of its members. This principle should lead to a similar restriction to countermeasures in the latter case. Countermeasures would not be allowed if some reasonable means for ensuring compliance with the obligations of the member concerning cessation of a continuous wrongful act and reparation are available in accordance with the rules of the organization. It is clear that those rules may further restrict countermeasures or, on the contrary, allow them to be used more widely.

66. The following text of draft article 19 is here proposed:

Draft article 19
Countermeasures

1. Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a lawful countermeasure on the part of the former international organization.

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[106] Some examples were given in my sixth report (A/CN.4/597), para. 58.

[107] See A/CN.4/582, sect. M.

[108] This was observed by Italy (A/C.6/63/SR.19, para. 96).

[109] Reference is here made to article 55 as provisionally adopted by the Drafting Committee (see A/CN.4/L.725/Add.1).

2. An international organization is not entitled to take countermeasures against a responsible member State or international organization if, in accordance with the rules of the organization, reasonable means are available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

67. Article 22 on necessity has proved controversial. In drafting it, the Commission took into account the diverse views that had been expressed by several States at the sixtieth session of the General Assembly, in response to a request for comments that was contained in the Commission's report.[110] According to article 22, necessity precludes wrongfulness of an act of an international organization only when there is an imminent peril to "an essential interest of the international community as a whole" and "the organization has, in accordance with international law, the function to protect that interest". Contrary to one interpretation given to article 22,[111] there is no indication in that article that a regional international organization would be precluded from protecting an essential interest of the international community. States that are members of an international organization, regional or other, may well confer on that organization functions that imply the task of protecting an essential interest of the international community.

68. The solution that was adopted by the Commission in article 22 was endorsed by several States.[112] However, some States would have preferred that "the essential interests of member States, or indeed the organization itself, could also be the basis for an international organization's invocation of necessity".[113] One State proposed to amend article 22 in order to refer to "an essential interest that the organization, in accordance with international law, has the function to protect".[114] Also the International Monetary Fund urged "a broader construction of 'essential interest' than is suggested by the Commission's commentary on draft article 22".[115]

69. On the other hand, one State argued that "international practice did not provide sound support for the invocation of necessity by an international organization".[116] Another State "questioned whether it would ever be appropriate for an international organization to rely on necessity to violate its international obligations".[117] A further State suggested the deletion of the article.[118]

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[110] An overview of these replies may be found in paragraph 4 of the commentary to article 22, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, p. 274.

[111] See the intervention by France (A/C.6/61/SR.14, para. 59).

[112] Finland, on behalf of the European Union (A/C.6/61/SR.13, para. 26), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., para. 30, with the remark quoted immediately afterwards in the text), Austria (ibid., para. 38), Argentina (ibid., para. 48) and Germany (A/C.6/61/SR.14, para. 2).

[113] Thus Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 30). A similar point was made by Ireland (ibid., paras. 42-44), Spain (A/C.6/61/SR.14, para. 49) and France (ibid., para. 59). Cuba (A/C.6/61/SR.16, para. 12) referred to the safeguard of "an essential interest of the organization". The same solution was advocated by A. Reinisch, "Editorial: How Necessary is Necessity for International Organizations?", *International Organizations Law Review*, vol. 3, No. 2 (2006), p. 177.

[114] The proposal was made by France (A/C.6/61/SR.14, para. 59).

[115] See A/CN.4/582, sect. II.O.

[116] Thus China (A/C.6/61/SR.14, para. 8).

[117] See the intervention of the United Kingdom (A/C.6/61/SR.15, para. 28).

[118] This was the position of India (A/C.6/61/SR.16, para. 9).

70. The concept of an essential interest that the organization has the function to protect was found by yet another State as "a vague and potentially expansive standard".[119] Some other States criticized the reference to an essential interest of the international community as a whole or argued that it was not clear.[120] However, this is not a new concept. It already appears in the corresponding text of the articles on the responsibility of States for internationally wrongful acts.[121] There is no specific reason for further elaborating in the present context the meaning of an essential interest of the international community as a whole.

71. Given the endorsement of article 22 by a certain number of States and the fact that the critical comments go in opposite directions and that a prevailing trend cannot be detected, it seems preferable not to propose any amendment of article 22.

72. The suggestions made in the present section may be summarized as follows:

(a) Article 18 on self-defence should be deleted;

(b) Article 19 on countermeasures should be drafted on the basis of the text reproduced above, paragraph 66.

VII. Responsibility of a State in connection with the act of an international organization

73. Only a few States made a general endorsement of chapter (X) ("Responsibility of a State in connection with the act of an international organization").[122] Some further States[123] gave their approval of articles 25 to 27. These adapt to the relations between a State and an international organization the provisions concerning aid or assistance, direction and control, and coercion that were set out for the relations between States in the articles on the responsibility of States for internationally wrongful acts. The idea of including such an adaptation in the current draft had already been accepted by a larger group of States,[124] in response to a question raised by the Commission in its report to the General Assembly relating to its fifty-seventh session.[125]

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[119] See the comment by the United States (A/C.6/61/SR.14, para. 82).

[120] These remarks were made by Austria (A/C.6/61/SR.13, para. 38), the United Kingdom (A/C.6/61/SR.15, para. 28), the Islamic Republic of Iran (ibid., para. 53) and Jordan (A/C.6/61/SR.16, para. 3).

[121] Article 25 (b).

[122] Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 30), and Belarus (A/C.6/61/SR.14, para. 98).

[123] Argentina (A/C.6/61/SR.13, para. 48) and France (A/C.6/61/SR.14, para. 60), though wondering whether "a saving clause ... would not have been sufficient" (a similar view had been voiced the previous year, A/C.6/60/SR.11, para. 80). Also, the European Commission endorsed articles 25 to 27 (A/C.6/61/SR.16, para. 15).

[124] See the interventions by China (A/C.6/60/SR.11, para. 52), Austria (ibid., para. 64), the Republic of Korea (ibid., para. 86), Italy (A/C.6/60/SR.12, para. 4), Belarus (ibid., paras. 49-50), the Russian Federation (ibid., para. 70), Romania (ibid., para. 77), Hungary (A/C.6/60/SR.13, para. 8), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., para. 20), the Libyan Arab Jamahiriya (A/C.6/60/SR.19, para. 11) and Algeria (A/C.6/60/SR.20, para. 60).

[125] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. III, sect. A, para. 28.

74. Two States suggested an addition to the commentary to article 25, in order to distinguish the case of aid or assistance in the commission of an internationally wrongful act from the implementation by a State of a binding act of the organization[126] and the "mere involvement of a member State in the day-to-day functioning of an international organization".[127] The latter concern appears to be met by the observation made in paragraph 2 of the commentary to article 25, that "the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization".[128] With regard to the other comment, one may note that, when a wrongful act is taken by an international organization with the assistance or aid of a State, the act is attributed to the international organization, while the act of a State implementing a binding act of an organization is attributable to that State and represents an internationally wrongful act of the same State.[129]

75. One difficulty in defining more precisely aid or assistance in the commission of an internationally wrongful act is that, for the purpose of assessing whether aid or assistance occurs, much depends on the content of the obligation breached and on the circumstances. Thus, it seems preferable not to modify the wording that was used in the provision (article 16) included in the articles on the responsibility of States concerning aid or assistance given by a State to another State. However, some further clarifications could be given in the commentary to article 25. One State suggested adding that "relevant intention would be required, as had been specified in the commentary to the corresponding article on State responsibility".[130] Another suggestion would be to take over a further part of the commentary to article 16 on the responsibility of States, which aims at making it clearer that the aiding or assisting State "would have to play an active role in the commission of the wrongful act".[131]

76. Only a few remarks were specifically addressed to articles 26 and 27. These comments were requests for clarifications,[132] which are difficult to give at the present stage in the development of the law on international responsibility. One State suggested adding a few words to subparagraph (a) in article 27 so that it would read: "The act would, but for the coercion, be an internationally wrongful act of the international organization or of the coercing States".[133] While the current text of article 27 only mentions the coerced international organization, this proposal would add a reference to the coercing State. Subparagraph (a), as the parallel article 18 on the responsibility of States for internationally wrongful acts, envisages the possibility that the coerced entity would not incur responsibility because it was

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[126] See the comment made by France (A/C.6/61/SR.14, para. 60).

[127] Thus the intervention by Greece (A/C.6/61/SR.15, para. 37). Jordan (A/C.6/61/SR.16, para. 4) queried "whether a financial contribution to the annual budget of the organization would constitute aid or assistance to the commission of the wrongful act".

[128] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, p. 279.

[129] If the conduct is attributed to the executing State, there is no need for a specific provision dealing with the case of a State "acting as an executing agent of an organization", as was suggested by Greece (A/C.6/61/SR.15, para. 40), apparently adopting a different premise.

[130] Thus Greece (A/C.6/61/SR.15, para. 37).

[131] See the comment by Romania (A/C.6/61/SR.19, para. 60).

[132] See the interventions by Austria (A/C.6/61/SR.13, para. 40) and Jordan (A/C.6/61/SR.16, para. 4).

[133] The proposal was made by Switzerland (A/C.6/61/SR.15, paras. 1-2).

forced to act against its will. It seems difficult to understand why the fact of exercising coercion should come into reckoning in order to exonerate also the coercing State from an international responsibility which that State would otherwise incur.

77. Although arguably innovative, the idea underlying article 28, that a State cannot escape responsibility when it circumvents one of its obligations by availing itself of the separate legal personality of an international organization of which it is a member, was remarkably well received.[134] This is not to say that the wording of the provision was generally considered satisfactory. Several States argued that the Commission should amend article 28 in order to narrow down the responsibility of member States.[135]

78. Various suggestions were made for the purpose of restricting the responsibility of member States. One of them does not seem to address specifically the object of article 28. The European Commission proposed to take from the *Bosphorus* judgment of the European Court of Human Rights the conclusion that "there was no circumvention if the State transferred powers to an international organization which was not bound by the State's own treaty obligations but whose legal system offered a comparable level of guarantees".[136] However, the fact that an equivalent standard may be regarded as sufficient depends on the content of the international obligation concerned. If a treaty considers that an obligation to take a certain conduct may be satisfied by providing a comparable level of guarantees there would be no breach of an international obligation and hence no international responsibility.

79. One State suggested that the "scope of the application of the article ... be limited to cases where the international organization was not itself bound by the obligation breached".[137] No doubt, circumvention is more likely to occur in one of those cases. However, there would be little justification for considering that the existence of an obligation also for the international organization should exonerate the circumventing State.

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[134] See the favourable comments of Ireland (A/C.6/61/SR.13, paras. 45-46), Argentina (ibid., para. 48), Germany (A/C.6/61/SR.14, para. 3), Belgium (ibid., para. 39), Spain (ibid., para. 50), France (ibid., para. 61), Italy (ibid., para. 67), Poland (ibid., para. 105), Switzerland (A/C.6/61/SR.15, para. 3), the United Kingdom (ibid., para. 30), Greece (ibid., para. 38), New Zealand (ibid., para. 43), Jordan (A/C.6/61/SR.16, para. 5), the Russian Federation (A/C.6/61/SR.18, para. 68) and Sierra Leone (A/C.6/61/SR.19, para. 68). See also the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 31), and the Netherlands (A/C.6/61/SR.14, para. 21). Finland, speaking on behalf of the European Union (A/C.6/61/SR.13, para. 27), expressed the "serious concerns" of the Union; this position was reiterated by the European Commission (A/C.6/61/SR.16, paras. 15-16). Doubts were expressed by Austria (A/C.6/61/SR.13, para. 40) and Japan (A/C.6/61/SR.14, para. 58).

[135] See the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 31), Ireland (ibid., paras. 45-46), Germany (A/C.6/61/SR.14, para. 3), Netherlands (ibid., para. 21), Belgium (ibid., para. 39), Spain (ibid., para. 50), France (ibid., para. 61), Italy (ibid., para. 67), Switzerland (A/C.6/61/SR.15, para. 3), the United Kingdom (ibid., para. 30), Greece (ibid., para. 38) and the Russian Federation (A/C.6/61/SR.18, para. 68). A similar suggestion was made by the European Commission (A/C.6/61/SR.16, paras. 15-16).

[136] A/C.6/61/SR.16, para. 16.

[137] Thus Greece (A/C.6/61/SR.15, para. 38).

80. One could address a similar observation on the proposal that circumvention be considered relevant only when a transfer of competence is made by member States to an international organization in its constituent instrument.[138] The adoption of such a proposal would leave out those cases in which a transfer of functions occurs, as it often does, on the basis of rules of the organization other than the constituent instrument, while circumvention could be equally significant in the latter cases.

81. One State proposed to replace "circumvention" with "a more neutral term".[139] Other States seemed to point to a different direction when they suggested "the introduction of some element of bad faith, specific knowledge or deliberate intent"[140] or of "misuse".[141] If a reference to intent was inserted in article 28, intent should not necessarily be linked with the transfer of competence to the international organization.[142] That transfer could well have occurred in good faith, while the opportunity for circumventing an international obligation may have appeared only at a later stage.

82. A reference to intention or bad faith in article 28 would no doubt have the effect of restricting the international responsibility of member States. However, such a reference would introduce a subjective test which would be difficult to apply. It thus seems preferable to try to achieve a similar objective, instead of by requiring an assessment of intent, by referring to what may reasonably be assumed from the circumstances. It should in any case be clear that the transfer of competences to an international organization does not per se imply circumvention and thus responsibility for the member States concerned.

83. Paragraph 1 of article 28 could be recast as follows:

> "A State member of an international organization incurs international responsibility if:
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> "(a) it purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation, and
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> "(b) the organization commits an act that, if committed by the State, would have constituted a breach of the obligation."

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[138] This proposal was made by Belgium (A/C.6/61/SR.14, para. 39).

[139] Thus Switzerland (A/C.6/61/SR.15, para. 3).

[140] See the intervention by the United Kingdom (A/C.6/61/SR.15, para. 30). Also Ireland (A/C.6/61/SR.13, paras. 45-46) insisted on the "requirement of intent" on the part of the member State that the obligation be breached. A similar view was expressed by Spain (A/C.6/61/SR.14, para. 50).

[141] This suggestion was made by Germany (A/C.6/61/SR.14, para. 3).

[142] France (A/C.6/61/SR.14, para. 61) suggested that relevance be given to the member State's "intention in conferring competence ... to avoid complying with its international obligations". See also the intervention by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 31), which expressed the view that only the transfers of competence "made with the intention to evade responsibility" should "give rise to responsibility". On the other hand, J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *International Organizations Law Review*, vol. 4 (2007), p. 91, at p. 100, criticized the Commission for having given in article 28 "a very narrow understanding of the abuse of the legal personality at the *level of the creation of the organization*".

84. Also article 29, concerning the responsibility of member States of an international organization for the internationally wrongful act of that organization, attracted several comments. There was wide support for restricting the responsibility of member States, as provided in article 29, to the case that member States accepted responsibility or led the injured party to rely on their responsibility.[143]

85. As set out in the commentary, article 29 implies that, as a residual rule, "membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act".[144] Opinions of States were divided on the question of whether this residual rule should be expressed in the text.[145] While such an addition would arguably add clarity to the text, the current draft, like the articles on the responsibility of States for internationally wrongful acts, only sets out when responsibility arises and does not indicate when responsibility is not incurred.

86. Some States raised the issue of the relevance of the rules of the organization for the responsibility of member States.[146] This issue has to be considered on the basis of the assumption that the rules of the organization produce effects only in the relations between an international organization and one or more of its members or between members of the organization, and not with regard to non-members. Since this point, which already underlies article 35, is relevant for a number of issues, it will be addressed in a general provision, to be placed in the final part (see below, draft article 61). Thus, supposing that the rules of the organization restricted responsibility, they could not be opposed as such to a non-member State. Nor would rules providing for a wider responsibility of member States be of avail to a non-member State, which could rely on the rules of the organization only if member States had made them relevant in their dealings with the non-member. On the other hand, it is clear that the rules of the organization would prevail as special rules in the relations between the members of the organization.

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[143] See the interventions by Argentina (A/C.6/61/SR.13, para. 48), Germany (A/C.6/61/SR.14, para. 4), the Netherlands (ibid., para. 22), France (ibid., para. 62, though with some criticism of subparagraph (b)), Italy (ibid., para. 66), Portugal (ibid., para. 76, advocating "a more precise language in order to preclude the consideration of implied action"), Switzerland (A/C.6/61/SR.15, para. 4, suggesting an extension of responsibility of member States in case of a criminal organization), New Zealand (ibid., para. 44) and Sierra Leone (A/C.6/61/SR.19, para. 68). See also the interventions by Belgium (A/C.6/61/SR.14, para. 40), Spain (ibid., para. 51), Belarus (ibid., para. 99), the Republic of Korea (A/C.6/61/SR.15, paras. 20-21, criticizing the idea of an "implied acceptance"), the United Kingdom (ibid., para. 31, considering the drafting "too broad"), Jordan (A/C.6/61/SR.16, para. 5).

[144] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, p. 287.

[145] Germany (A/C.6/61/SR.14, para. 4) spoke against expressing a negative rule, while the Netherlands (ibid., para. 22) and Greece (A/C.6/61/SR.15, para. 39) took the opposite view.

[146] See the interventions of Belarus (A/C.6/61/SR.14, para. 99), the United Kingdom (A/C.6/61/SR.15, para. 31) and Jordan (A/C.6/61/SR.16, para. 5). A. Stumer, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", *Harvard International Law Journal*, vol. 48, No. 2 (2007), p. 553, at pp. 563-564, considered that the Commission had left "unresolved" the question "whether a provision in the constituent instrument stating that member States would be liable for the debts of the organization could be relied upon by a third party".

87. The European Commission noted that "explicit acceptance of responsibility was severely curtained by the constitutional law of the organization".[147] This comment appears to refer to the fact that the rules of the organization may preclude member States from accepting responsibility when it falls on the organization. However, should a member State nevertheless accept responsibility in its relations with a non-member, the "constitutional law of the organization" would not prevent acceptance of responsibility from obtaining its intended effect.

88. One State suggested that the text should reflect a point made in the commentary, namely that "a State had to accept responsibility for the act of the organization vis-à-vis the victim of the act and not vis-à-vis the organization itself".[148] This could arguably be done by rephrasing the part of subparagraph 1 (a) preceding the semicolon as follows: "It has accepted responsibility for that act towards the injured party". However, it is not certain that the addition of these four final words is really necessary. Moreover, there would be a slight ambiguity in the text, because the acceptance of responsibility could be made "towards" the injured party but not necessarily be operative in the relations with that party.

89. A drafting suggestion was made also with regard to paragraph 2 of article 29. According to this proposal, wording should be added "to the effect that a State's international responsibility was subsidiary to that of the international organization".[149] While one could indeed specify that the responsibility of member States is presumed to be subsidiary "to that of the responsible organization", this is implied by the current text. It may thus not be necessary to spell it out.

90. Although it was also made with reference to article 29, a further proposal raises a different issue, by envisaging an additional case of responsibility of certain member States: those who "played a major or leading role in the commission of an act by an international organization". It is argued that the "main responsibility for the consequences of that act should be placed on the member State".[150] This view would entail not only an additional responsibility for member States, but may also affect the primary responsibility of the organization for the wrongful acts that are attributed to it. This proposal, which reflects the view of what seems to be a minority opinion among the States, finds only limited support in practice.[151]

91. A further question concerns the placement of chapter X. The Commission has yet to settle this point. One element to consider is that chapter X contains the only provisions in the current draft that address the matters covered in paragraph 2 of article 1, that is, the international responsibility of States for the internationally wrongful act of an international organization. The preferable solution seems to be to place chapter X as Part Five, after the Part (currently Part Three) relating to the

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[147] A/C.6/61/SR.16, para. 17. Acceptance of (presumably subsidiary) responsibility cannot be equated with acknowledgement of attribution of conduct, which is covered by article 7, contrary to what was suggested by R. Rivier, "Travaux de la Commission du droit international (cinquante-huitième session) et de la Sixième Commission (soixante et unième session)", *Annuaire français de droit international*, vol. 52 (2006), p. 305, at pp. 344-345.

[148] Thus Greece (A/C.6/61/SR.15, para. 39).

[149] This proposal was made by Belgium (A/C.6/61/SR.14, para. 40).

[150] This point was elaborated by China (A/C.6/61/SR.14, para. 9).

[151] One instance of practice is provided by a claim made by Bosnia and Herzegovina against the United Kingdom in relation to action taken by that State in the Security Council. See J. Quigley, "State Responsibility for Ethnic Cleansing", *University of California at Davis Law Review*, vol. 32, No. 2 (1998-1999), p. 341, at pp. 375-377.

implementation of the international responsibility of an international organization. One advantage of this solution would be to give continuity to the examination of the responsibility of international organizations within the draft.

92. In conclusion to this section, which concerns articles 25 to 30, the following proposals are made:

(a) Chapter X should be placed after the current Part Three as Part Five;

(b) Article 28, paragraph 1, should be recast as suggested above, paragraph 83;

(c) Certain additions should be made to the commentary to article 25, as noted above, paragraph 75.

VIII. Content of international responsibility

93. Several States expressed their general agreement with the approach taken by the Commission in chapter I ("General principles") of Part Two ("Content of international responsibility").[152] Some States specifically endorsed article 35, which affirms that a responsible international organization cannot rely, in its relations to a non-member, on the rules of the organization as justification for its failure to comply with one of its obligations under international law.[153]

94. Leaving the question of the acceptability of article 43 aside, one may note that a certain number of States also expressed their general agreement with the provisions contained in chapter II ("Reparation for injury").[154]

95. Article 43 sets out that "[t]he members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter". This article elicited several comments. The majority of States that expressed views on the article indicated their

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[152] See the interventions by Argentina (A/C.6/62/SR.18, para. 62), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., para. 98), Greece (A/C.6/62/SR.19, para. 5), Guatemala (ibid., para. 20), Germany (ibid., para. 30), India (ibid., para. 106), France (A/C.6/62/SR.20, para. 6), the Russian Federation (A/C.6/62/SR.21, para. 67), Romania (ibid., para. 76), Switzerland (ibid., para. 79) and Sierra Leone (A/C.6/62/SR.24, para. 98). See also the intervention by the European Commission (A/C.6/62/SR.21, para. 114). At a later session, the United States (A/C.6/63/SR.21, para. 8) expressed the view that the "general obligation to make reparation for injury, for example, might have the effect of diverting the resources of international organizations away from funding the internationally agreed functions of the organization towards protecting against unquantifiable litigation risks ...". While this may conceivably occur, it is difficult to see on what basis the injured party should not be entitled, at least in principle, to receive full reparation.

[153] Argentina (A/C.6/62/SR.18, para. 62), Ireland (ibid., para. 93), Greece (A/C.6/62/SR.19, para. 6), Germany (ibid., para. 30), India (ibid., para. 106), the Republic of Korea (A/C.6/62/SR.21, para. 35), the Russian Federation (ibid., para. 67), Romania (ibid., para. 76), Switzerland (ibid., para. 79) and Belarus (ibid., para. 95).

[154] See the interventions by Argentina (A/C.6/62/SR.18, para. 62), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., para. 98), Guatemala (A/C.6/62/SR.19, para. 20), Germany (ibid., para. 30), France (A/C.6/62/SR.20, para. 6), the Russian Federation (A/C.6/62/SR.21, para. 67) and Romania (ibid., para. 76).

basic agreement with the Commission's text.[155] Some States argued that there was no need to include in the draft a provision such as article 43.[156] Some other States commented that the reference to the rules of the organization required elucidation.[157] Also the words "all appropriate measures" and "required" prompted some queries.[158]

96. Only a few States favoured, as an alternative to article 43, the text that had been suggested by a minority within the Commission and had been reproduced as a footnote in the Commission's report and again in the commentary to article 43.[159]

97. Concerns were expressed that article 43 should not be understood as implying that member States or international organizations have a subsidiary obligation to provide reparation.[160] Although the current text does not appear to convey that there would be an obligation for members towards the injured entity, a clarification in this regard could be given by adding to article 43, as a second paragraph, a text such as the following one:

> "2. The preceding paragraph does not imply that members acquire towards the injured State or international organization any obligation to make reparation."

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[155] Support for article 43 was expressed by Ireland (A/C.6/62/SR.18, para. 92), Guatemala (A/C.6/62/SR.19, para. 20), Germany (ibid., para. 31), Sri Lanka (ibid., para. 66), the Netherlands (A/C.6/62/SR.20, paras. 37-38), the Russian Federation (A/C.6/62/SR.21, para. 67), Romania (ibid., para. 77) and Switzerland (ibid., paras. 81-83). See also the interventions by the European Commission (ibid., para. 115) and Sierra Leone (A/C.6/62/SR.24, para. 98), and the written comments by the World Health Organization (see A/CN.4/593, sect. II.D) and the World Trade Organization (ibid.).

[156] This view was expressed by India (A/C.6/62/SR.19, para. 106), France (A/C.6/62/SR.20, para. 6) and Hungary (A/C.6/62/SR.21, para. 15). See also the comment by Italy (A/C.6/62/SR.19, para. 39).

[157] Switzerland (A/C.6/62/SR.21, para. 82) suggested that "the limits on the obligations of the members of a responsible international organization to contribute should be stated more clearly in the draft article". New Zealand (A/C.6/62/SR.21, para. 42) maintained that the reference to the rules of the organization "should not be interpreted as justifying inaction by the members of an organization in the absence of suitable rules". Romania (A/C.6/62/SR.21, para. 77) noted that "strict adherence to the internal rules of an organization might render timely reparation impossible". Ireland (A/C.6/62/SR.18, para. 92) referred to "a case where, for example, the rules expressly prohibited extraordinary financial contributions from members to finance operations". However, it would be difficult to base an obligation for member States to contribute on rules other than the rules of the organization.

[158] See, respectively, the interventions by the Republic of Korea (A/C.6/62/SR.21, para. 36) and Romania (ibid., para. 77).

[159] The text was reproduced in *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, pp. 198 (footnote 510) and 216. Austria (A/C.6/62/SR.18, paras. 53-54) and Japan (A/C.6/62/SR.19, para. 99) favoured this text. See also the comments by Argentina (A/C.6/62/SR.18, para. 62) and Israel (A/C.6/62/SR.21, para. 100). Specific criticism of the alternative text was voiced by Hungary (A/C.6/62/SR.21, para. 15), which "shared the majority view that the alternative version of draft article 43 offered in footnote 510 of the report would be unnecessary, since the stated obligation was implied in the obligation of the responsible international organization to make full reparation".

[160] See in particular the interventions by Greece (A/C.6/62/SR.19, para. 7), Malaysia (ibid., para. 74) and Israel (A/C.6/62/SR.21, para. 100). The possibility of a subsidiary responsibility of member States was admitted in this context by Belarus (ibid., para. 96).

98. A further question concerns the placement of article 43. The European Commission suggested that it should be moved to chapter I so that it would be placed among the general principles.[161] However, since article 43 concerns the performance of the obligation of reparation, which is defined in chapter II, the current position seems more appropriate.

99. The content of chapter III ("Serious breaches of obligations under peremptory norms of general international law") reflects the views expressed by several States at the sixty-first session of the General Assembly,[162] in response to the question, raised by the Commission in its report,[163] whether this chapter should be drafted along the lines of the corresponding chapter in the articles on the responsibility of States for internationally wrongful acts. Some endorsements of the text of articles 44 and 45 were made at the following sessions of the General Assembly.[164]

100. One State observed that "the obligation of an international organization to cooperate to bring to an end through lawful means any serious breach must take into account the ability of the organization depending on its mandate".[165] This point may have been adequately addressed in the commentary to article 45, when it explains that this provision "is not designed to vest international organizations with functions that are alien to their respective mandates".[166]

101. In conclusion to the present section, which relates to the current Part Two (articles 31 to 45), only one change is suggested: that of adding a second paragraph to article 43, as proposed above, paragraph 97.

IX. Implementation of international responsibility

102. The draft articles relating to the invocation of responsibility of an international organization (articles 46 to 53) were adopted by the Commission at its sixtieth session and could thus be discussed only at the sixty-third session of the General Assembly. At that session, several States expressed their general approval of these draft articles, in particular those relating to the invocation of international

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[161] A/C.6/62/SR.21, para. 115 and A/CN.4/593, sect. II.D. A similar proposal was made by the International Organization for Migration (see A/CN.4/593/Add.1, sect. II.A).

[162] This view was expressed by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33), Argentina (ibid., para. 50), the Netherlands (A/C.6/61/SR.14, para. 25), Belgium (ibid., paras. 43-46), Spain (ibid., para. 54), France (ibid., para. 64), Belarus (ibid., para. 101), Switzerland (A/C.6/61/SR.15, para. 8), Jordan (A/C.6/61/SR.16, para. 5), the Russian Federation (A/C.6/61/SR.18, para. 68) and Romania (A/C.6/61/SR.19, para. 60).

[163] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, sect. B, para. 28.

[164] See in particular the interventions by Argentina (A/C.6/62/SR.18, para. 63), Malaysia (A/C.6/62/SR.19, para. 74) and Cuba (A/C.6/63/SR.24, para. 26). Greece (A/C.6/62/SR.19, para. 8) and Cyprus (A/C.6/62/SR.21, para. 37) insisted on the importance of the obligation of non-recognition as stated in article 45. A general endorsement of articles 44 and 45 was made also by the European Commission (A/C.6/62/SR.21, para. 116).

[165] Thus Argentina (A/C.6/62/SR.18, para. 63). Switzerland (A/C.6/62/SR.21, para. 84) expressed a similar concern.

[166] This statement in the commentary to article 45 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. VIII, sect. C, p. 219) was welcomed by Ireland (A/C.6/62/SR.18, para. 95).

responsibility by an injured State or international organization.[167] In later written comments also the Organization for the Prohibition of Chemical Weapons and UNESCO expressed support for articles 46 to 53, the latter organization subject to a few minor drafting suggestions.[168]

103. The inclusion of a provision on admissibility of claims (article 48) was welcomed.[169] While it is clear, and need not be expressed, that the requirement of nationality does not apply to a claim put forward by an injured international organization,[170] the suggestion was made that the Commission examine in this context issues relating to functional protection: for instance, whether an international organization could bring a claim for the benefit of a former official.[171] However, there is only a limited analogy between the question of the admissibility of claim by a State on behalf of one of its nationals — to which article 48 refers — and that of the admissibility of functional protection by an international organization.[172] Moreover, it would be difficult to state on this matter a rule generally applying to all, or most, international organizations.[173]

104. With regard to the further requirement stated in article 48 — exhaustion of local remedies — the use of the term "local" as applied to remedies raised a few comments.[174] As was explained in the commentary to article 48,[175] this provision is intended to include both remedies existing "within an international organization" and those "available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to

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[167] See the interventions by the Czech Republic (A/C.6/63/SR.19, para. 90, with reference to articles 46 to 51), Italy (ibid., para. 96), the Russian Federation (A/C.6/63/SR.21, para. 39, with reference to articles 46, 47, 50 and 51), Belgium (ibid., para. 47) and Romania (ibid., para. 56). See also the intervention by the European Commission (A/C.6/63/SR.22, para. 20). Austria (A/C.6/63/SR.18, para. 82) observed that there were "good reasons for accepting" that the right to invoke responsibility "could be based on the implied powers doctrine". This remark appears to concern competence under the rules of the organization rather than the entitlement of an international organization to invoke responsibility under international law.

[168] See A/CN.4/609, sect. II.B to D, F and G.

[169] The importance of introducing a provision on admissibility of claims was stressed by Argentina (A/C.6/63/SR.19, para. 76).

[170] The Russian Federation (A/C.6/63/SR.21, para. 39) proposed that the inapplicability of the requirement of nationality to a claim by an international organization be "made clear in the draft itself". However, like the articles on the responsibility of States for internationally wrongful acts, the current draft does not contain "negative" propositions and the need to introduce one exception in the context of article 48 is not self-evident.

[171] This was suggested by Austria (A/C.6/63/SR.18, para. 85).

[172] As the International Court of Justice noted in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (*I.C.J. Reports 1949*, p. 186), "the bases of the two claims are different".

[173] In its advisory opinion referred to in the previous note, the International Court of Justice developed an argument that specifically related to the United Nations (ibid., pp. 181-184). Slovenia (A/C.6/58/SR.17, para. 9) said that it was "opposed to granting international organizations the right to exercise functional protection on behalf of their officials".

[174] The Russian Federation (A/C.6/63/SR.21, para. 39) would have preferred the use of the term "legal" instead of "local", but the latter term is more usual and may be considered a term of art.

[175] *Official Records of the General Assembly, Sixty-third session, Supplement No. 10* (A/63/10), chap. VII, sect. C, p. 289, para. 9.

examine claims".[176] Some States observed that this "would include the various internal tribunals and bodies competent to address the relevant issues".[177] The "scope of individuals' entitlement" to remedies[178] cannot be usefully specified in the current articles, because it would depend on the international organization and on the injury.

105. Failing any indication to the contrary, the rules of the organization will determine whether an organ of an international organization is competent to waive a claim on behalf of the organization validly.[179] The fact that article 49 does not contain a reference to the rules of the organization is in line with the absence of any reference to the internal law of a State, both in the same article and in article 45 on the responsibility of States for internationally wrongful acts, when the valid waiver of a claim by a State is considered.

106. The question whether acquiescence has occurred may give rise to doubts, but it is difficult to state a general rule with regard to "the appropriate time frame for a claim to be treated as having lapsed".[180]

107. Article 51 addresses the case of a plurality of responsible States or international organizations. It does not assume that when a State is responsible together with an international organization, the responsibility of a State would be necessarily subsidiary or concurrent. Whether responsibility is subsidiary or concurrent depends on the pertinent rules of international law.[181] When responsibility is concurrent, it was noted that the injured entity may "decide the order in which it [invokes] the responsibility of the responsible State or international organization".[182]

108. In its report on its fifty-ninth session the Commission requested comments on the question of whether an international organization could invoke responsibility in

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[176] France (A/C.6/63/SR.20, para. 39) observed that "the term 'local remedies' should be defined, because individuals could take action against a State before jurisdictions that were not national". The commentary arguably attempts to provide the necessary explanations.

[177] Thus Denmark, on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/63/SR.20, para. 1). G. Thallinger, "The Rule of Exhaustion of Local Remedies in the Context of the Responsibility of International Organizations", *Nordic Journal of International Law*, vol. 77 (2008), p. 401, at p. 423, "suggested that the rule of exhaustion of local remedies should be adapted and 'softened' when applied to claims by states against international organizations". What appears to be meant is that the rule should be applied more strictly: "As long as the international organizations provide some adequate mechanism of legal redress, they should be given the means to rectify the wrongdoing of their organs" (at p. 425).

[178] Japan (A/C.6/63/SR.22, para. 18) suggested that this scope be defined.

[179] See the commentary to article 49, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), chap. VII, sect. C, pp. 290-291, paras. 3-4. This point was stressed by Argentina (A/C.6/63/SR.19, para. 77). The Russian Federation (A/C.6/63/SR.21, para. 40) suggested the addition of a rule on competence.

[180] Israel (A/C.6/63/SR.24, para. 75) requested "further clarification" on this point.

[181] Argentina (A/C.6/63/SR.19, para. 78) referred instead to the rules of the organization.

[182] Thus China (A/C.6/63/SR.19, para. 69). While Greece rightly noted (A/C.6/63/SR.21, para. 3) that "the subsidiary responsibility could be invoked only insofar as the invocation of primary responsibility had not led to reparation", this does not prevent the injured party from addressing a claim before the subsidiary responsibility is triggered, provided that the subsidiary character of the responsibility is acknowledged. See the commentary to article 51, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), chap. VII, sect. C, p. 294, para. 3.

case of a breach of an international obligation owed to the international community as a whole. The question was as follows: "Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?".[183] Some States gave, at least tentatively, an unqualified positive answer,[184] while other States indicated that the organization invoking responsibility had to be given the mandate to protect the general interest underlying the obligation breached.[185] The latter view was endorsed by the Commission and reflected in article 52. The solution adopted by the Commission attracted some favourable comments[186] at the following session of the General Assembly. A few doubts were also expressed.[187]

109. Two States suggested that the invocability of the international responsibility in the case in hand be further limited to those international organizations that have "a universal vocation".[188] However, since a State could individually invoke responsibility for the same breach, it seems more coherent to accept that even a small number of States could establish an international organization that includes among its functions the protection of the general interest underlying the obligations and that the same organization could do what the States are entitled to do individually.

110. Although the draft articles on countermeasures (articles 54 to 60) were adopted only by the Drafting Committee and were thus not included in the Commission's report relating to its sixtieth session, a certain number of States referred to the text of those articles in the debates in the Sixth Committee at the sixty-third session of the General Assembly. Other States made some more general remarks.

111. Some States stressed the need to make a distinction between countermeasures and sanctions.[189] While countermeasures are acts that would per se be unlawful, sanctions are lawful measures that an international organization may take against its

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[183] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30.

[184] See the interventions by Hungary (A/C.6/62/SR.21, para. 16), Cyprus (ibid., para. 38), Belgium (ibid., paras. 89-90) and Belarus (ibid., para. 97). See also the intervention by Malaysia (A/C.6/62/SR.19, para. 75).

[185] Thus Argentina (A/C.6/62/SR.18, para. 64), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., paras. 99-100), Italy (A/C.6/62/SR.19, para. 40), Japan (ibid., para. 100), the Russian Federation (A/C.6/62/SR.21, para. 70) and Switzerland (ibid., para. 85).

[186] By Argentina (A/C.6/63/SR.19, para. 78), Germany (ibid., para. 84), the Russian Federation (A/C.6/63/SR.21, para. 41) and the European Commission (A/C.6/63/SR.22, para. 23).

[187] According to China (A/C.6/63/SR.19, para. 70) there is "no established practice" to justify the Commission's text. Austria (A/C.6/63/SR.18, para. 84) considered that "the limited functions of many international organizations argued against their capacity to invoke responsibility for the breach of an obligation owed to the international community as a whole". This objection is arguably taken care of by the requirement set out in article 52 that the functions of the organization invoking responsibility include "safeguarding the interest of the international community underlying the obligation breached".

[188] Belarus (A/C.6/63/SR.19, para. 60) and Argentina (ibid., para. 78, from which the quotation is taken).

[189] See the interventions by Germany (A/C.6/63/SR.19, para. 86), Portugal (A/C.6/63/SR.20, para. 25), Viet Nam (ibid., para. 38), Greece (A/C.6/63/SR.21, para. 1) and Spain (A/C.6/63/SR.22, para. 5).

members according to the rules of the organization. Sanctions are therefore not considered in the chapter on countermeasures.

112. The main question under discussion was whether there should be a chapter on countermeasures at all. Several States had expressed a favourable view at the sixty-second session of the General Assembly, in response to a request for comments made by the Commission.[190] At the following session, various States gave their basic approval to the draft articles that had been meanwhile provisionally adopted by the Drafting Committee.[191]

113. As was noted by the World Health Organization, "there is no cogent reason why an international organization that breaches an international obligation should be exempted from countermeasures taken by an injured State or international organization to bring about compliance by the former organization with its obligations. Conversely, it would seem illogical to deprive an international organization injured by a breach of an international obligation by another international organization of the possibility of taking retaliatory measures to induce the latter organization to comply with its obligations".[192] In the same vein, UNESCO wrote that it did not "have any objection to the inclusion of draft articles on countermeasures".[193]

114. Several States stressed the need of caution when considering countermeasures. The Commission is certainly aware of this need, since the manifest purpose of the chapter on countermeasures is to restrict them with a series of substantive and procedural rules. A few States nevertheless expressed doubts about the advisability of addressing the issue of countermeasures in the current draft.[194] Some other States suggested that recourse to countermeasures be further limited, by admitting as countermeasures only "withholding the performance of contractual obligations under treaty relationships".[195]

115. Concern was expressed that countermeasures taken against an international organization should not "impair the exercise of the functional competence of international organizations".[196] This concern appears to be met by article 54,

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[190] Argentina (A/C.6/62/SR.18, para. 64, for the case that the organization had "a close connection to the right protected by the obligation breached"), Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (ibid., para. 101), Italy (A/C.6/62/SR.19, para. 41), Malaysia (ibid., para. 75), Japan (ibid., para. 100), the Netherlands (A/C.6/62/SR.20, para. 40), the Russian Federation (A/C.6/62/SR.21, para. 71), Switzerland (ibid., para. 86) and Belgium (ibid., para. 91).

[191] Argentina (A/C.6/63/SR.19, para. 79), Germany (ibid., paras. 85-86), Malaysia (A/C.6/63/SR.20, para. 36), Romania (A/C.6/63/SR.21, para. 56), Spain (A/C.6/63/SR.22, para. 5) and Japan (ibid., para. 18). The same view was expressed by the European Commission (ibid., para. 24). The Russian Federation (A/C.6/63/SR.21, para. 41) maintained that international organizations may take countermeasures against other international organizations only to "the extent of their particular competence". This restriction seems implied. There is no indication in the draft articles that the taking of countermeasures would justify *ultra vires* acts.

[192] See A/CN.4/609, sect. II.I.

[193] Ibid.

[194] Greece (A/C.6/63/SR.21, para. 1). See also the interventions by the United Kingdom (ibid., para. 24) and Israel (A/C.6/63/SR.24, para. 75).

[195] Thus the Republic of Korea (A/C.6/63/SR.19, para. 64). A similar view was expressed by the Czech Republic (ibid., para. 92).

[196] Thus Belarus (A/C.6/62/SR.21, para. 98 and A/C.6/63/SR.19, para. 58). A similar point was made by Israel (A/C.6/63/SR.24, para. 75).

paragraph 4, according to which "countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions".

116. Several remarks were addressed on the question whether an injured member of a responsible international organization could take countermeasures against that organization. In this matter the rules of the organization clearly have a significant role to play.[197] They take "precedence as *lex specialis* over general international law on countermeasures when the dispute [is] between the organization and one of its member States".[198] According to one view, "the rules of the organization determine whether an organization could [...] be the target of countermeasures" by its members.[199] However, the rules of the organization do not necessarily regulate the matter and there is therefore the need for a residual rule.

117. The view was expressed that "as a general rule, countermeasures had no place in the relations between an international organization and its members".[200] Some doubts were voiced about whether that principle and the limited exceptions are adequately stated in article 55.[201] This is a point that the Commission may wish to reconsider.

118. With regard to article 56, it has been observed that most of the obligations that, according to that provision, cannot be breached for the purpose of taking countermeasures against a responsible international organization are "owed to the international community at large, not to the international organization against which countermeasures might be taken".[202] A similar remark could be made with regard to States in relation to the parallel provision in the articles on the responsibility of States for internationally wrongful acts. The meaning of the restrictions on the obligations that may be breached when taking countermeasures is to say that a breach of the obligation would not be justified even in the relations between the injured State or international organization and the responsible organization.

119. In conclusion to the ninth section, no proposal for change is made to the draft articles (46 to 60) that are considered in the present section.

X. General provisions

120. Like the articles on the responsibility of States for internationally wrongful acts, the current draft should be completed by a few general provisions. These are

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[197] The need of compliance with the rules of the organization was stressed by Belgium (A/C.6/63/SR.21, para. 48). On a similar line, the Philippines (A/C.6/63/SR.19, para. 43) and Uruguay (A/C.6/63/SR.21, para. 45) referred to the "constituent instruments" of the organization.

[198] Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/63/SR.20, para. 1). A similar statement was made in the written comments of the Legal Counsel of WHO (see A/CN.4/609, sect. II.I).

[199] Thus India (A/C.6/63/SR.23, para. 22).

[200] Germany (A/C.6/63/SR.19, para. 86). See also the interventions by France (A/C.6/63/SR.20, para. 40) and Greece (A/C.6/63/SR.21, para. 2).

[201] UNESCO supported the wording that had been suggested in my sixth report (see A/CN.4/597, para. 48) "only if this is not inconsistent with the rules of the injured organization". See A/CN.4/609, sect. II.I.

[202] Thus Romania (A/C.6/63/SR.21, para. 56).

intended to apply to issues relating both to the international responsibility of international organizations and to the responsibility of States for the internationally wrongful act of an international organization. According to the suggestions made above, paragraphs 21 and 92, Parts Two to Four will cover the international responsibility of international organizations and Part Five the responsibility of States for the internationally wrongful act of an international organization. If these suggestions are accepted, the general provisions will build up Part Six. Unlike the matters that have been considered in the preceding sections of the present report, the general provisions are discussed here for the first time.

121. The great variety of international organizations, which many States and international organizations stressed in their comments, makes it essential to acknowledge the existence of special rules on international responsibility that apply to certain categories of international organizations, or to one specific international organization, in their relations with some or all States and other international organizations.[203] These special rules (*lex specialis*) may supplement the more general rules that have been drafted in the current text or may replace them, in full or in part.

122. It would be an impossible task for the Commission to try and identify the content and the scope of application of these special rules. Thus, the opinions that have been voiced about the existence of special rules have not been examined in the previous reports and are not going to be discussed here. It may appear that there has been one exception, because some attention has been given to the issue, raised by the European Commission, of whether a "special rule of attribution of conduct" exists for the European Community and "other potentially similar organizations", with regard to the attribution of acts of member States implementing binding acts of the relevant organization to that organization.[204] This issue leads to a wider question, that needs to be considered in the context of the present draft: whether, as a general rule, conduct taken by a State or an international organization when implementing an act of another international organization of which it is a member is attributable to the latter organization. Also in view of some recent developments in judicial and other decisions, this question has been discussed again above, paragraphs 31 to 33. The outcome of the discussion on the wider question does not settle the issue of the existence of a special rule on attribution concerning a category

[203] When the suggestion of including a provision on *lex specialis* was made in my fifth report (A/CN.4/583, para. 3), it was welcomed by Ireland (A/C.6/62/SR.18, para. 96) and the United Kingdom (A/C.6/62/SR.19, para. 44).

[204] A/C.6/59/SR.21, para. 18. The European Commission also suggested some other possibilities: that of providing for "special rules of responsibility, so that responsibility could be attributed to the organization, even if organs of member States were the prime actors of a breach of an obligation borne by the organization" and that of making a "special exception or saving clause for organizations such as the European Community". The second alternative would be covered by a provision concerning *lex specialis* such as the one suggested in paragraph 124 below. The first alternative does not seem to require the existence of a special rule on responsibility. Responsibility would depend on the content of the obligation breached. Supposing that an international organization accepts an obligation towards a third State to ensure a certain result and that this result is not achieved because of the conduct of one of its member States, the organization would incur responsibility under the general rules, even if the relevant conduct was attributed to the member State. On the other hand, the member State would not incur responsibility if it has not acquired a parallel obligation under international law towards the third State.

of international organizations, or even only an individual organization, in their relations to States and other international organizations.

123. The rules of the organization are likely to build a body of special rules affecting to a certain extent the application of the rules on international responsibility in the relations between an international organization and its members.[205] It is clear that the rules of the organization are relevant for a number of issues that have been considered in the present draft, so much so that various provisions could include the words "subject to the special rules of the organization". A provision on *lex specialis* would make this repeated proviso unnecessary, even if there was no specific mention of the rules of the organization. However, given the practical importance of the rules of the organization as a possible source of *lex specialis*, it seems appropriate to make an express reference to those rules.

124. The following text takes into account the wording of article 55 on the responsibility of States for internationally wrongful acts and adds a reference to the rules of the organization:

Draft article 61
Lex specialis

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, such as the rules of the organization that are applicable to the relations between an international organization and its members.

125. The present draft addresses issues relating to the international responsibility of States only to the extent that these issues are dealt with in what is currently chapter X and should become Part Five, according to the suggestion made above, paragraph 92. As was noted above, paragraph 8, given the definition of the scope of the current draft as outlined in article 1, other issues concerning State responsibility are not covered, even when they are not expressly covered in the articles on the responsibility of States for internationally wrongful acts. Since there would be no reason to infer that matters concerning State responsibility that are not addressed in the draft are not covered by other rules of international law, it may seem superfluous to state this in a general provision. However, if this point is made in a general provision with regard to the responsibility of international organizations, the fact of not adding a reference to States may lead to unintended implications.

126. The main purpose of a general provision concerning rules of international law other than those existing on matters regulated in the present draft seems to be to convey that the draft does not address all the issues of international law that may be relevant in order to establish whether an international organization is responsible and what responsibility entails. A similar point was made with regard to States in article 56 on the responsibility of States for internationally wrongful acts.[206]

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[205] See on this point especially the intervention by Poland (A/C.6/59/SR.22, para. 1).

[206] *Yearbook ... 2001*, vol. II (Part Two), p. 141.

127. Article 56 on the responsibility of States for internationally wrongful acts may serve as a model for a text that would refer to the responsibility of both international organizations and States and may read as follows:

Draft article 62
Questions of international responsibility not regulated by these articles

> The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these articles.

128. The present draft does not address questions of individual responsibility. While this may appear obvious, it seems nevertheless useful to include in the draft a general provision that is designed as a reminder of the fact that issues of individual responsibility may arise in connection with a wrongful act of an international organization. This would make it clear that the official position of an individual cannot exempt that individual from international responsibility that he or she may incur for his or her conduct. A similar course was taken in the articles on the responsibility of States for internationally wrongful acts by including article 58 among the general provisions.

129. When an internationally wrongful act of an international organization or a State is committed, the responsibility under international law of individuals acting on behalf of the international organization or the State cannot be taken as implied. There are, however, cases in which responsibility of certain individuals is likely, as in the case of those who are instrumental for the serious breach of an obligation under a peremptory norm of general international law that is envisaged in article 44 of the current draft and in article 40 of the responsibility of States for internationally wrongful acts.

130. It is therefore proposed to include a draft article that replicates article 58 on the responsibility of States for internationally wrongful acts, with the addition of four words in order to extend its scope to international organizations. The text would read as follows:

Draft article 63
Individual responsibility

> These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

131. The last provision in the articles on the responsibility of States for internationally wrongful acts sets out that the articles are "without prejudice to the Charter of the United Nations". This is meant to point to the impact that the Charter may have on issues of State responsibility. The impact may result directly from the Charter or from acts taken by one of the organs of the United Nations pursuant to the Charter. What applies to issues of State responsibility that are regulated by the

pertinent articles also applies to questions of State responsibility that are covered in the present draft.

132. While Article 103 of the Charter only refers to conflicts between "obligations of the Members of the United Nations under the present Charter", on the one hand, and "their obligations under any other international agreement", on the other, the impact of the Charter is not limited to obligations of members of the United Nations. The Charter may well affect obligations, and hence the responsibility, of an international organization. Should, for instance, a resolution adopted by the Security Council under Chapter VII of the Charter exclude the adoption of countermeasures against a certain State, neither States nor international organizations could lawfully resort to those countermeasures.[207] It is not necessary, for the purpose of the present draft, to define the extent to which international responsibility of an international organization may be affected, directly or indirectly, by the Charter.[208]

133. Article 59 on the responsibility of States for internationally wrongful acts may be reproduced without change:

Draft article 64
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

134. In conclusion to this tenth section, it is suggested to include in the draft the four articles above, paragraphs 124, 127, 130 and 133.

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[207] According to Poland (A/C.6/61/SR.14, para. 105) the provision on countermeasures as a circumstance precluding wrongfulness (article 19) "should contain an explicit reference to the Charter and United Nations law, in order to indicate the possible scope and substantive and procedural limitations to countermeasures taken by an international organization". A general provision could fulfil the same function.

[208] Belgium (A/C.6/61/SR.14, para. 46) suggested that "a saving clause, modelled on article 59 of the articles on responsibility of States for internationally wrongful acts, should be added at the end of the draft articles on responsibility of international organizations".